

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1166

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

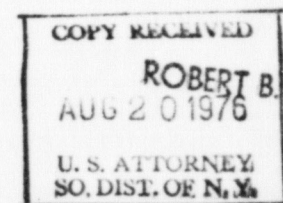
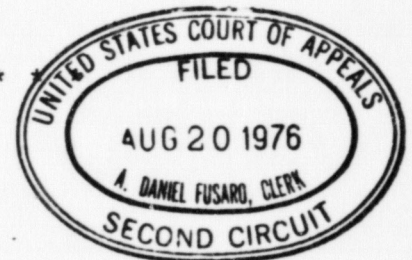
-against-

DAVID RODRIQUEZ,

Defendant-Appellant.

APPELLANT DAVID RODRIQUEZ' APPENDIX

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DATE	IV. PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
04-26-76	Filed notice that the original record on appeal has been certified and transmitted to the U.S.C.A. the 26th of April 76				
05-26-76	Filed notice that the supplemental record on appeal has been certified and transmitted to the U.S.C.A.				
06-04-76	Filed Notice that supplemental record on appeal has been Certified and transmitted to USCA this day.				
		(a)	(b)	(c)	(d)
		Interval (per Section II)	Start Date End Date	Ltr. Code	Total Days

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA

- v -

LOUIS SOTO,
RICARDO FONDEUR, a/k/a "Ricky,"
JOSE DELVAS, a/k/a "Tiger," and
DAVID RODRIGUEZ, a/k/a "Slick,"

Defendants.

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: INFORMATION

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COUNT ONE

The United States Attorney charges:

1. From on or about April 9, 1975 and continuously thereafter up to and including the date of the filing of this information, in the Southern District of New York, LOUIS SOTO, RICARDO FONDEUR, a/k/a "Ricky," JOSE DELVAS, a/k/a "Tiger," and DAVID RODRIGUEZ, a/k/a "Slick," the defendants, unlawfully, wilfully, and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 922(a)(1) of Title 18, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully, and knowingly would and did engage in the business of dealing in firearms and ammunition, none of them being a licensed dealer.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about April 9, 1975, defendant LOUIS SOTO accepted approximately \$190.00 for the purchase of two firearms, to wit, a 20 gauge Mossberg sawed-off shotgun and a .22 caliber revolver, H & R Model 923 bearing serial number L37746.

2. On or about April 9, 1975, defendant LOUIS SOTO gave defendant DAVID RODRIGUEZ, a/k/a "Slick," and defendant RICARDO FONDEUR, a/k/a "Ricky," approximately \$150.00 from the payment obtained for the firearms described in paragraph 1.

3. On or about May 7, 1975, defendant LOUIS SOTO offered for sale a .38 caliber revolver.

4. On or about May 7, 1975, defendant JOSE DELVAS, a/k/a "Tiger," accepted approximately \$150.00 as payment for the firearm described in paragraph 3 above.

5. On or about May 8, 1975, defendant LOUIS SOTO attempted to hide a firearm under the stairwell at 990 Leggett Ave, Bronx, New York.

6. On or about May 8, 1975, defendant DAVID RODRIGUEZ, a/k/a "Slick," gave defendant LOUIS SOTO a .38 caliber revolver with the serial number obliterated.

7. On or about May 8, 1975, defendant LOUIS SOTO accepted approximately \$200.00 as payment for the firearm described in paragraph 6 above.

(Title 18, United States Code, Section 371)

COUNT TWO

The United States Attorney further charges:

From on or about April 9, 1975 and continuously thereafter up to and including May 15, 1975, in the Southern District of New York, LOUIS SOTO, RICARDO FONDEUR, a/k/a "Ricky," JOSE DELVAS, a/k/a "Tiger," and DAVID RODRIGUEZ, a/k/a "Slick," the defendants, not being licensed dealers, did unlawfully, wilfully and knowingly engage in the business of dealing in firearms and ammunition.

(Title 18, United States Code, Section 922(a)(1) and Section 2).

COUNT THREE

The United States Attorney further charges:

On or about April 9, 1975, in the Southern District of New York, LOUIS SOTO, RICARDO FONDEUR, a/k/a "Ricky," and DAVID RODRIGUEZ, a/k/a "Slick," the defendants, unlawfully, wilfully and knowingly possessed a firearm, to wit, a Mossberg 20 gauge sawed-off shotgun, model 185K-A, no serial number, which firearm was not registered to any of the said defendants in the National Firearms Registration and Transfer Record.

(Title 26, United States Code, Section 5861(d)
and Title 18, United States Code, Section 2).

COUNT FOUR

The United States Attorney further charges:

On or about April 9, 1975, in the Southern District of New York, LOUIS SOTO, RICARDO FONDEUR, a/k/a "Ricky," and DAVID RODRIGUEZ, a/k/a "Slick," the defendants, unlawfully, wilfully and knowingly transferred a firearm, to wit, a Mossberg 20 gauge sawed-off shotgun, model 185K-A, no serial number, in violation of the provisions of Title 26, United States Code, Section 5812, in that none of the said defendants filed with the Secretary of the Treasury or his delegate a written application, in duplicate, for the transfer and regulation of the firearm to the transferee on the application form prescribed by the Secretary or his delegate.

(Title 26, United States Code, Section 5861(c)
and Title 18, United States Code, Section 2).

THOMAS J. CANNILL
United States Attorney

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2 THE COURT: Is there anything further, limited
3 to what was brought out on redirect only?

4 MR. SEFFERN: Nothing further.

5 MR. LIPSON: I have nothing, your Honor.

6 MR. CANTOR: No, your Honor.

7 THE COURT: There being nothing further of this
8 witness, he may come down.

9 You are excused.

10 (Witness excused.)

11 THE COURT: Do you have another witness, Mr.
12 Mac Beth?

13 MR. MAC BETH: Yes. The Government calls
14 Gunnar Erickson.

15 G U N N A R E R I C K S O N, called as a witness by
16 the Government, being first duly sworn, testified as
17 follows:

18 MR. MAC BETH: May I proceed, your Honor?

19 THE COURT: Yes.

20 DIRECT EXAMINATION

21 BY MR. MAC BETH:

22 Q Mr. Erickson, how are you employed?

23 A I am a special agent with the Bureau of Alcohol,
24 Tobacco and Firearms Division of the Treasury.

25 Q How long have you been with the Bureau of Alcohol,

2 Tobacco and Firearms?

3 A A little over six years.

4 Q What are your duties with the Bureau of Alcohol,
5 Tobacco and Firearms?

6 A I am a ballistics expert for Alcohol, Tobacco
7 and Firearms in addition to doing regular agent work.

8 Q Before you were with the Bureau of Alcohol,
9 Tobacco and Firearms how were you employed?

10 A I was employed by the New York City Police
11 Department.

12 Q What was your position with the New York City
13 Police Department?

14 A At the time I retired?

15 Q Yes.

16 A I was a ballistics expert for New York City.

17 Q How long --

18 MR. CANTOR: That calls for a conclusion, if
19 your Honor please, that he was a ballistics expert. That's
20 for the jury to determine. That's the ultimate fact in
21 issue with respect to this witness.

22 THE COURT: Was that your title?

23 THE WITNESS: I was a detective in the Ballistics
24 Squad.

25 Q How long had you been in the Ballistics Squad?

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A Almost 18 years.

Q What did your duties in the Ballistics Squad involve?

A I investigated all the shootings that took place in New York City; 20 percent of them were mine.

Q In the course of the time that you have been with the New York City Police, with the Ballistics Squad and with the Bureau of Alcohol, Tobacco and Firearms, how many guns would you say approximately you have examined in that period?

A Many, many thousands.

Q And how many times have you testified in court as to guns which you have examined?

A Many hundreds of times I have testified in court in addition.

Q What training have you had in identifying guns?

A Identifying guns?

Q Guns or firearms.

A Primarily on-the-job training. There is no formal training for ballistics work.

Q I show you Government's Exhibit 2A in evidence. Can you tell the jury what type of gun that is?

MR. PRAVDA: I would object, your Honor. We want to have a report to find out if it has been examined

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previously or in what fashion.

THE COURT: You want to have a reporter?

MR. PRAVDA: No, I would like to have questions eliciting whether or not it has been previously examined and in what manner it has been examined rather than just going right to a conclusion which the Government seeks to bring out.

THE COURT: You can ask the witness that on cross-examination. The Government can conduct its own examination.

Now, is there a question as to the witness' qualifications, Mr. Cantor, as an expert in ballistics?

MR. CANTOR: No, I concede he is an expert. I only objected that before we elicited the qualifications of the gentleman, he said he was a ballistics expert. The cart came before the horse. I concede his qualifications so the record is clear on behalf of my client, Mr. Delvas.

THE COURT: The Court finds that the witness is an expert in ballistics.

Now proceed. What is your question of the witness?

Q Can you tell the jury what kind of gun that is?

A It is a 20-gauge Mosserberg bolt action clip magazine repeater.

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2 Q Are you familiar with the definition of a shotgun
3 under Title 26 of the United States Code, Section 5845(d)?

4 A Yes, sir, I am.

5 Q Would that gun come within the definition of a
6 shotgun?

7 A Yes, sir, it would.

8 Q How would you distinguish that gun as a shotgun
9 from a rifle?

10 A In that a rifle has rifling. A shotgun is
11 smooth bored.

12 Q You have examined that gun and found it to be
13 smooth bored?

14 A Yes. You showed me that gun this morning, sir.

15 Q Have you measured the barrel of that gun?

16 A Yes, sir, I did.

17 Q What length did you find it to be?

18 A Ordinarily what would be done with this to truly
19 measure the barrel: the bolt would be inserted, closed
20 into a battery position, it would be cocked, a cleaning
21 rod would be dropped down, the extreme end would be marked,
22 taken out and measured. This bolt just about aligns with
23 the rear face here in the receiver in this port opening
24 and within a fraction of an inch with 17 and an eighth;
25 it is under the required 18.

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Q The barrel is less than 18 inches?

A Yes, it is

Q Have you also examined the stock of that gun?

A Yes, sir, I have.

Q Have you noticed that the stock has the word
"Remington" on it?

A You are referring to the butt plate, yes, sir.

Q Does the fact that the barrel has "Mosserberg"
on it while the butt place has "Remington" on it in any
way change your opinion that that is a Mosserberg shotgun?

A No. This has nothing to do with it. This is
a part that just screws on. In fact, the action has been
glass bedded here. Someone has opened up the clip mortise
here to accept a clip. This stock in its original state
wasn't that way. It appears to be a Remington stock in
that Remington utilizes this brass pin that goes through
the stock on the Model 700, 722 and 721. It could be
anything, but it has the earmarks of a Remington stock.

MR. CANTOR: Judge, it's very illuminating but
quite unresponsive to the question. I move that it be
stricken.

MR. MAC BETH: I think that it is responsive to
the question.

MR. CANTOR: May we have the question reread?

(Record read.)

THE COURT: Motion to strike as "unresponsive" denied.

All right, proceed.

Q So it is your opinion that that is a --

A It is a Mosserberg, yes, sir.

Q It is a Mosserberg 20-gauge shotgun?

A Yes, sir.

MR. MAC BETH: I have no further questions of this witness, your Honor.

THE COURT: Mr. Seffern?

MR. SEFFERN: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. SEFFERN:

Q You described the usual test for barrel length as putting a rod in the barrel with the clip or the bolt in place, is that correct?

A Yes, sir.

Q You didn't actually perform that test.

A In this particular -- in other words, I don't have a cleaning rod with me. I would be very happy to perform it in the fashion you so desire.

Q But that is the way it is usually performed?

A Yes, sir.

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Q We are very close now to being an 18-inch barrel?

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A No, sir, we are not. We are talking about seven-eighths-of-an-inch which would not amount to that much.

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Q Are you having trouble getting the bolt --

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A No, somebody uncocked it and placed it in wrong. In other words, the front surface here of the bolt in this particular firearm ends up in the battery position at the rear portion here of the receiver ring. The seven-eighths-of-an-inch would not be gained because the face of the bolt, even allowing back to this distance, is in excess of the measurement that I gave you.

14

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Q You say that's the usual way of measuring a barrel length. Are there any instructions any place on how to measure barrel lengths that you know of?

17

18

A That's customarily how it's done, sir; that's correct.

19

Q Customarily?

20

21

A Right. Where possible. If you like, I will go get a cleaning rod.

22

23

Q No, I am talking about how you arrive at the method of measuring the barrel length.

24

25

A The barrel constitutes that portion; except in a revolver, it contains the chamber and contains the

1 barrel itself --

2
3 Q The barrel contains the chamber and the barrel
4 itself.

5 A That's correct. In other words, in a revolver
6 the cylinder length is not included in that the chamber
7 is not part of the barrel.

8 Q I see.

9 What's this part of the gun normally called?

10 A That's called the "stock."

11 Q And what's this part of the gun normally called?

12 A Without the bolt?

13 Q What's it normally called?

14 A That's a "barreled action."

15 Q Are you sure it isn't a "barrel"?

16 A It's a "barreled action."

17 Q A "barreled action"?

18 A Yes, sir.

19 Q That is the barrel of the gun, is it not?

20 A Yes.

21 Q It is connected to this part here, is it not?

22 A That is the action, sir.

23 Q This is part of the action, too, isn't it?

24 A That's a bolt.

25 Q In any event, you do not measure this as the

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barrel length?

A No, sir. No, sir.

Q Nor do you measure the part where the clip went in?

A No, sir.

Q You say that's customary?

A Yes. This is how it is prescribed to be measured, yes.

Q Where is it prescribed, sir?

A This is policy.

Q It is what?

A Policy.

Q Policy by your department?

A By the department I am now employed in and the department I was previously employed in.

Q So we are relying on the policy, now, of the police department and the Department of the Treasury for measurements of barrels?

A That's the way they do it, sir.

Q Thank you.

MR. SEFFERN: No further questions.

MR. LIPSON: Your Honor, I have no questions.

THE COURT: Any further examination of this witness?

1 MR. MAC BETH: Perhaps I might put one more
2
3 question.

4 THE COURT: Just a moment. The defense hasn't
5 finished.

6 Mr. Pravda?

7 MR. CANTOR: Can we have one moment, Judge.

8 THE COURT: Yes.

9 (Pause.)

10 CROSS-EXAMINATION

11 BY MR. PRAVDA:

12 Q You indicated, Mr. Erickson, that that particular
13 weapon has been substantially altered from its original
14 manufacture, is that correct?

15 A Yes, sir. There has been changes.

16 Q There was glass beading, I think you said --

17 A No. It is glass bedded.

18 Q The clip mortise has been opened.

19 A In that that stock wasn't originally intended
20 for that particular barreled action, yes.

21 Q Of course it came with a stock at the time of
22 manufacture, is that not correct?

23 A Ordinarily they do, yes, sir.

24 Q And that's been changed?

25 A That is not the original stock.

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2 Q You say you are familiar with the definition of
3 Title 26. What definition were you referring to in
4 response to Mr. Mac Beth's question?

5 A Relative to a shotgun.

6 Q And what is that definition, sir?

7 A "Made, remade, designed, re-designed, readily
8 convertible to expelled projectile or projectiles through
9 a smooth bore. The weapon is designed to be fired from
10 the shoulder."

11 Q Smooth bore is the key determining factor as
12 opposed to a rifle, is that not correct?

13 A A rifle has rifling, yes, sir.

14 Q Is it possible for a shotgun barrel to be
15 rifled at some point after its first manufacturing?

16 A Is it possible?

17 Q Yes, sir.

18 A Anything is possible.

19 Q Did you examine the entire length of this barrel
20 to see whether there had been any rifling?

21 A Yes, sir. I looked through it this morning.

22 Q How did you do that, sir?

23 A By visually looking through the barrel. It is
24 smooth bored. It has no rifling. It has no lands and
25 grooves.

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Q Were you able to see the entire inside of the barrel?

A I sure was.

Q You are convinced it has never been altered or changed at no time?

A When you say "altered or changed," are we talking about the inner --

Q As to the inside.

A The inner surface of the barrel; no, sir.

Q You feel it was never rifled?

A No, sir. Shotguns are not rifled.

Q I understand, but you say it is possible to convert one to the other. I take it, then, it is possible to reconvert as well.

A You asked me if it was possible. Yes, if a person had rifling broaches and so forth, of course, anything is possible.

Q And it could have been reconverted one again to another?

A No. Then the bore diameter would be different.

Q So that once done, it can be done in one direction but not the other?

A No. Each of these machining processes would have to remove more metal and if you had rifling inside,

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there and then subsequently decided to remove the rifling
you would change the inner diameter of 20 gauge.

Q Did you check whether the inner diameter of
this weapon was changed?

A Visually -- I haven't measured it, but it would
be substantial. You would see it readily. In addition,
I can see the gun has been re-glued.

Q Aside from your examination this morning, did
you ever see Government's Exhibit 2A before?

A Yes, sir, I have seen it before.

Q Have you examined it previously?

A When you say "examined," do you mean test fire?

O Examine it to make these conclusions which you
have testified to this morning.

A I physically looked at it, in that one of the
special agent's in this case sits in a desk adjoining mine
and at that occasion I did see it on his desk. There was
no long, lengthy examination made.

Q In other words, it was passing by the adjoining
desk you observed it, having a general interest in such
matters?

A In firearms, yes.

Q But you didn't examine it previous to today?

A I don't know if you consider a visual observation

1 an examination. If you do, then I did examine it before;
2 otherwise, I did not.
3

4 Q But the type of examination you subjected it to
5 this morning, you had not previously done?

6 A That's correct, sir.

7 Q Is it correct to say, sir, that you have no
8 idea as to the precise condition of Government Exhibit 2A
9 at the time it came into the possession of the Bureau of
10 Alcohol, Tobacco and Firearms?

11 A We try to safeguard the exhibits, sir. That's
12 all I can say.

13 Q But you are not familiar with what its condition
14 was at that time?

15 A No, sir.

16 I have no other questions.

17 THE COURT: Mr. Cantor, do you have any questions?

18 MR. CANTOR: Yes. Will you give me a moment,
19 Judge?

20 THE COURT: Yes.

21 (Pause.)

22 CROSS-EXAMINATION

23 BY MR. CANTOR:

24 Q What is striations, sir?

25 A Striations?

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Q Yes.

A There are lots of definitions. You mean pertaining to ballistics and ballistics comparison?

Q Yes. In terms of ballistics science, the generic term "striation; it does have a meaning, does it not?

A It does in tool markings also.

Q In terms of ballistics.

A Striations are the individual markings that are peculiar to that part, whatever you are referring to. In other words, an extractor, an ejector, bolt face, the lands, the grooves all have machining operations unique to that particular firearm and identification can be made on the basis of those characteristics.

Q You have had how many years at the ballistics laboratory here for the New York City Police Department?

A Almost 18.

Q Almost 18 years?

A That's correct, sir.

Q When you left the Police Department of the City of New York, how many gentlemen or ladies, for that matter, were employed in the ballistics laboratory?

A Approximately 20. They changed the process since then.

1 Q It was your contention or claim at the time
2 you left the New York City Police Department 20 percent of
3 all of the shootings in the City of New York were assigned
4 to you for ballistics analysis?
5

6 A That's correct, sir.

7 Q When you left the New York City Police Department,
8 with what rank was it, sir?

9 A I was a detective.

10 Q Detectives are composed of three grades, are they
11 not, in New York City?

12 A There was a time there was three plus grades.

13 Q At the time you left?

14 A Three grades, yes.

15 Q First, second and third.

16 THE COURT: I don't understand the relevance
17 of this.

18 MR. CANTOR: Do you want me to make an offer?
19 I will, Judge.

20 THE COURT: What's the relevance of asking this
21 man about various ranks in the police department?

22 MR. CANTOR: We have a claim from the witness,
23 Judge, that 20 percent of all the shootings in New York
24 City were assigned to him for ballistics analysis. That's
25 a substantial amount of case work, Judge. In view of all

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the people -- individuals employed at the laboratory, in view of the individual's rank when he left the laboratory, I seek to indicate, Judge, something perhaps to the contrary, if I may proceed, Judge.

MR. MAC BETH: Your Honor, I fail to see the relevance of the inquiry as to the exact percentage of ballistics examinations that the witness undertook.

THE COURT: Yes.

MR. MAC BETH: Mr. Cantor himself conceded the man is an expert. It seems to me the question is about this gun, not whether he did 18 percent or 21 percent of the ballistics tests.

MR. CANTOR: Judge, I withdraw the question.

THE COURT: It is not relevant.

MR. CANTOR: I have withdrawn it.

THE COURT: Proceed, then.

Q Lands and grooves are peaks and valleys. Have you ever heard that expression?

A That's correct.

Q Those are the markings that appear upon a projectile that is expelled from a given firearm?

A If it contains lands and grooves, yes, sir.

Q Yes, if it contains rifle borings.

A In this case we are talking about a shotgun.

1 That's why I didn't understand your reference.

2 Q I am not talking about a shotgun. I am talking
3 about certain general principles that apply to ballistics
4 science, sir.

5 A That's correct.

6 Q When you deal with a rifle that has borings
7 in it and thus the projectile that is expended from it
8 has striations.

9 A The bullet has striations.

10 Q The expended bullet.

11 A The bullet, right.

12 Q When you are viewing a bullet for purposes of
13 ballistics science, you can view an expended bullet in a
14 gross visual manner, can you not, by just holding it up
15 before you?

16 MR. MAC BETH: Your Honor, I object. There are
17 no bullets in connection with this shotgun at all. I
18 fail to see any relevance to this line of inquiry.

19 THE COURT: Sustained.

20 Q Did you perform any microscopic examination, sir,
21 concerning any expended projectile with reference to the
22 Mosserberg?

23 A No, sir, I did not.

24 Q Would you agree, sir, that in terms of exactitude
25

2 for purposes of ballistics science --

3 A I didn't catch that word. Exactitude?

4 Q I will withdraw the question.

5 Would you agree, sir, that for purposes of
6 arriving as close as you can to certainty, the much more
7 preferable test is a microscopic examination of expended
8 projectiles rather than a gross visual examination.

9 A If you are trying to establish a ballistic
10 comparison it would have to be done in that fashion,
11 that's correct.

12 Q Are there occasions, sir, when projectiles are
13 expended from firearms with striations, where the markings
14 upon the bullet are very slight or insignificant?

15 THE COURT: I don't understand the relevance
16 of this inquiry into the bullet or projectile.

17 MR. CANTOR: I will explain it.

18 There is a contention made here that Government's
19 2A in this officer's opinion is a shotgun and one of the
20 key elements that he described in arriving at that determina-
21 tion is the lack of boring inside of this particular
22 instrument. I seek to indicate, Judge, that the most
23 proper and exact method for determining that would be a
24 microscopic examination of a test-fired expended projectile
25 from this weapon which was never done.

1 MR. MAC BETH: Your Honor, Mr. Cantor seems
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3 to continue on the notion that the bullets would be
4 fired out of this gun. I don't think he even laid that
5 foundation. It is my understanding that bullets would
6 not be fired from a shotgun.

7 MR. CANTOR: That's what I am seeking to show,
8 Judge.

9 Q Was there any testifying of this weapon done by
10 you or in your presence?

11 A No, I am not aware that there was.

12 MR. CANTOR: Thank you, I have no further
13 questions.

14 THE COURT: Mr. Lipson, did you have any questions?

15 MR. LIPSON: I have no questions.

16 THE COURT: All right.

17 REDIRECT EXAMINATION

18 BY MR. MAC BETH:

19 Q Mr. Erickson, are bullets fired from shotguns?

20 A Bullets ordinarily -- they can shoot rifle
21 slugs in a shotgun, but a bullet per se is not ordinarily
22 fired in a shotgun, that's correct.

23 Q Is it necessary to determine whether that gun is
24 a shotgun or a rifle to fire a projectile from it?

25 A No, it is not. Visual is entirely adequate.

1
2 Q You have described two methods of measuring the
3 barrel: One in which a cleaning rod is inserted into the
4 barrel; and the other method which you used, simply
5 measuring the length of the barrel back to the bolt.

6 A I included a portion of the bolt which would
7 have made the measurement, if anything, longer than
8 measuring it with a cleaning rod inserted to the face of
9 the bolt.

10 Q It would have made the length of the barrel
11 longer?

12 A Yes, sir.

13 Q That's what I wanted to establish.

14 MR. MAC BETH: Thank you very much.

15 THE COURT: All right, if there is nothing
16 further the witness may come down.

17 Thank you.

18 (Witness excused.)

19 THE COURT: Is there another witness?

20 MR. MAC BETH: Yes. The Government calls Louis
21 Diaz.

22 L O U I S D I A Z, called as a witness by the Govern-
23 ment, being first duly sworn, testified as follows:

24 MR. MAC BETH: May I proceed, your Honor?

25 THE COURT: Yes, you may.

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1 rglm

2 shotgun?

3 MR. PRAVDA: Government's Exhibit 2A, your
4 Honor.

5 THE COURT: All right, what's the next thing?

6 MR. PRAVDA: Then I would request that your
7 Honor charge to the jury with regard again to these
8 certificates, Government's Exhibits 6, 7 and 8, that the
9 jury may accept the certificate as evidence that a shotgun
10 was not registered to the defendant, but is not obliged
11 to do so; that it's up to the jury to determine the weight
12 to be given, and for that request I would cite to your Honor
13 the case of Robbins against the United States, 476 Fed. 2d.
14 26 from the Tenth Circuit in 1973.

15 THE COURT: That says what?

16 MR. PRAVDA: That apparently cites with approval
17 the request which I just made: that the certificate is
18 for the jury to accept or reject. They may accept it, but
19 they are not obliged to do so.

20 Lastly, your Honor, --

21 THE COURT: Could I have that citation?

22 MR. PRAVDA: Yes, your Honor. Robbins against
23 the United States, 476 Federal Reporter Second, Page 26.

24 THE COURT: What's next?

25 MR. PRAVDA: Lastly, your Honor, I would request

your Honor to charge that in both the Title 18 definition and the Title 26 definition for firearms and exceptions is created taking outside the ambit of the statute any antique firearms which is there defined as being "a weapon manufactured in or before 1898," and I would ask your Honor to charge that the jury must find that these weapons are not antique weapons for them to bring in a verdict of guilty and to any count.

THE COURT: That is no issue in the case. I am not going to charge on something that isn't in issue in the case.

MR. PRAVDA: Can I have an exception as a rejected charge, your Honor?

THE COURT: Yes. What is the claim? Your claim is that these are antiques?

MR. PRAVDA: My claim is that the burden is upon the Government to prove its case; that this is a statutory exception to violation of the law and that the Government must close that loophole to prove its case beyond a reasonable doubt.

THE COURT: What you are doing is injecting something into the case that isn't here.

MR. PRAVDA: Your Honor, the statute has been here.

1
2 THE COURT: Are you going to argue to the jury
3 that those are antiques?

4 MR. PRAVDA: I think it was the burden of the
5 Government to prove that.

6 THE COURT: No; I am asking you: Are you going
7 to argue that to the jury? If you are going to argue
8 that to the jury, then I will charge that.

9 MR. PRAVDA: Well --

10 THE COURT: Are you going to argue to the jury
11 that those are antiques made before 1898?

12 MR. PRAVDA: If your Honor grants the request
13 that the Government had to prove it, I surely will argue it,
14 your Honor. I must tailor my argument to what your Honor
15 will charge.

16 THE COURT: That means the Government has to
17 prove everything mentioned in the statute by that reasoning.

18 MR. PRAVDA: I think that is correct.

19 THE COURT: It is not an issue in the case unless
20 you are going to argue that is an antique and then I
21 will charge the jury on it, but I don't have to charge
22 the jury on something that is not an issue in this case.
23 There is no such issue here.

24 MR. SEFFERN: Your Honor, I intend to argue to
25 the jury there is no information as to the dates of

1 manufacture or where those guns in fact came from, from
2 the expert witness. I intend to argue that.

3 THE COURT: Where they came from?

4 MR. SEFFERN: We had an expert; we had Treasury
5 agents, and there is no information that traced these guns
6 back, and I am sure they had information.

7 THE COURT: Wait a minute, now, are you talking
8 about date of manufacture of these guns?

9 MR. SEFFERN: Yes, your Honor, that too.

10 THE COURT: So you are going to argue to the
11 jury that they are antiques?

12 MR. SEFFERN: There is no information before them
13 that says they are not antiques.

14 MR. CANTOR: Judge, on behalf of Mr. Delvas, I
15 would like to raise and preserve this point if indeed it
16 ever becomes pertinent. It is my position, Judge, just
17 as Mr. Pravda indicated to the Court, that antique fire-
18 arms are exempt from criminality with respect to this --

19 THE COURT: What's the date?

20 MR. PRAVDA: 1898, your Honor, is the cut-off
21 date.

22 THE COURT: I see.

23 MR. CANTOR: I take difference with my brother,
24 Mr. Pravda. I submit that the Government has in a
25

2 circumstantial way established the date of manufacture,
3 or at least in an approximate fashion, and that is, the
4 Government has offered the tangible physical objects them-
5 selves in evidence, and they give vent to some circumstan-
6 tial evidence, if your Honor pleases.

7 I am not an expert in ballistics at all whatso-
8 ever, but I used to watch "Gunsmoke" and that one on the
9 extreme left of that table, Judge -- Matt Dillon used to
10 have a big gun and perhaps there were other people on
11 this jury who can feel somewhat convinced that some of
12 these guns are not of a modern vintage.

13 Unfortunately, the gun that I am straddled
14 with, the Rossi, looks like a rather modern, sleek,
15 streamlined weapon, so I think the Government has by virtue
16 of this demonstration, has shown some date, although the
17 record is literally "barren" of the date of manufacture.
18 I think the obligation should not be thrust upon defense
19 counsel to give a representation to the Court that we
20 would argue this in summation.

21 I think the statute exists for our benefit and
22 if we seek to stand upon what others may deem to be a
23 technical loophole, so be it, Judge.

24 MR. MAC BETH: Your Honor, this is an exception
25 to the terms of the statute. It seems to me that then

1 becomes the kind of defense the defense has to raise.
2 Obviously, it would be --
3

4 THE COURT: I am asking them if they are going
5 to raise it and they said yes, that they are going to
6 argue that to the jury that those are antique weapons.

7 MR. CANTOR: I haven't indicated I am going
8 to expressly argue it. I am going to ask the jury to view
9 the weapons.

10 THE COURT: It is either in the case or it
11 isn't.

12 Now, is it time to elect, Mr. Seffern? Are
13 you going to argue these are antique weapons?

14 MR. SEFFERN: I am going to argue the date
15 was not submitted and they could be antique weapons, yes.

16 THE COURT: It is in the case.

17 MR. PRAVDA: Can I give the two statutory
18 provisions wherein that exception is set out?

19 THE COURT: Yes.

20 MR. PRAVDA: For the Title 26 definition, your
21 Honor, it is Title 26 United States Code, Section 5845,
22 Subdivision (g), as in George.

23 THE COURT: What does that say again?

24 MR. PRAVDA: It defines what an antique firearm
25 is.

THE COURT: All right, read it.

MR. PRAVDA: Then there is Title 18 --

THE COURT: Read it.

MR. PRAVDA: They are both quite the same.
Which one do you want, your Honor.

THE COURT: You said 5845(g) defines antique weapons.

MR. PRAVDA: That definition, your Honor, is (g), antique firearm:

"The term 'antique firearm' means any firearm not designed or re-designed for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in/or before 1898, including any matchlock, flintlock, percussion cap or similar type of ignition system manufactured in/or before the year 1898; and also any firearm using fixed ammunition manufactured in/or before 1898 for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade."

Your Honor may wish to contrast that with the definition in Title 18 for an antique firearm which is in certain slight ways a little different. It is found in Section 921, Subdivision (16). Therein it says:

"(16): The term 'antique firearm' means, a, any firearm, including any firearm with a matchlock, flint-

lock, percussion cap or similar type of ignition system manufactured in/or before 1898 and goes on to certain other definitions which I don't think are relevant to our case.

Then, your Honor, in Title 18, Section 921, Subdivision (a)(3), in defining the terms "firearm," it says that Subdivision -- at the end of Subdivision (d), it says:

"Such term does not include an antique firearm."

MR. MAC BETH: Excuse me, what subsection are you reading here?

MR. PRAVDA: 921 (a)(3).

"The firearm means--"and it goes on to say what it means; and it says, "such term does not include an antique firearm."

THE COURT: The definitions that you read of an antique firearm show by definition that these guns do not fall into that category, isn't that so?

MR. PRAVDA: No, I don't believe so, your Honor.

THE COURT: Why not?

MR. PRAVDA: Because the year of manufacture is made --

THE COURT: No, I said the definition given; not the year, the definition given in the statute shows that

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2 these guns do not fall into that definition.

3 MR. PRAVDA: I don't think that's correct, your
4 Honor.

5 THE COURT: Why not?

6 MR. CANTOR: We have had no testimony descriptive
7 of the mechanisms that are embraced, that break up these
8 particular guns. The only thing we have in this record
9 is a stipulation as to operability. The only description
10 concerning the mechanisms touch upon that rifle or shotgun
11 by the expert.

12 THE COURT: One is a 22-caliber pistol, isn't
13 that so?

14 MR. CANTOR: Yes.

15 THE COURT: The others are what, Mr. Mac Beth?

16 MR. MAC BETH: A 45-caliber pistol, two 38-caliber
17 revolvers and a 20-gauge shotgun.

18 THE COURT: By definition they don't fall into
19 that, the definition you gave, so I am not going to charge
20 on that.

21 MR. PRAVDA: Your Honor, as I understand the
22 definition, it is stated in the alternative.

23 THE COURT: They are pistols and no pistol is
24 described in your definition.

25 MR. CANTOR: Most respectfully, if your Honor please

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2 I asked the witness, the expert witness on the stand: Do
3 not pistols -- are they not composed of two sub-categories,
4 revolvers and automatics? A pistol is merely a generic
5 description, if your Honor pleases, that describes a
6 revolver and an automatic, a hand gun, a side arm, a
7 firearm, that is readily concealable. A pistol, the mere
8 verbiage "pistol" does not exempt it from the operability
9 of --

10 THE COURT: I just said I am not going to
11 charge on it because by definition these guns do not fall
12 in that category.

13 MR. SEFFERN: How about the long gun?

14 THE COURT: The long gun too doesn't fall into
15 that category. There is no definition of antique which
16 fits -- which begins to fit these guns.

17 MR. PRAVDA: Your Honor, I suggest that Section
18 921(a)(16) of Title 18 --

19 THE COURT: We are not going to prolong this
20 because I have ruled on it. I am not going to hear it.
21 I have ruled on it.

22 MR. PRAVDA: May I respectfully have an exception?

23 THE COURT: You don't have to respectfully ask for a
24 exception. You have an automatic exception. You made it
25 clear on the record.

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2 question that once the experts look at them, it takes
3 them about 10 seconds to tell that that's a shotgun and
4 not a rifle. It doesn't have rifling in the barrel. It
5 has "20 gauge" stamped on the outside from the Mosserberg
6 people and that is a shotgun and not a rifle.

7 The same, of course, goes for the length of
8 the gun. I think that if you look back at the agent's
9 testimony, you will see that if he used the other method
10 of measuring, the barrel would have been, if anything,
11 shorter and thus clearly within the statute. As far as
12 the barrel, I don't think there is a scintilla of evidence
13 that the barrel is anything other than what the expert
14 said it was, the area he in fact mentioned.

15 The same kind of defense, I think, is patently
16 offered in the suggestion that there is somewhere in the
17 files in Washington a certificate in the National Transfer
18 Record showing that one of the defendants registered to
19 transfer or possess that gun. I would think that would
20 be the first thing that any of the defense counsel would
21 do if they thought for one moment that such a certificate
22 existed, or excuse me, that such a registration existed.
23 They would bring it in. That would be the clearest, most
24 obvious proof that their defendants are not guilty of
25 the crime charged.

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2 Of course, there hasn't been any showing what-
3 soever that anything of that sort exists and I think for
4 the very obvious reason: that it simply doesn't.

5 Then there has been reference by a couple of
6 the defense attorneys to the affidavit done by Agent
7 Tolentino. I invite you to take a look at that and read it
8 thoroughly. I think it is perfectly obvious if you read
9 it that it is addressed to the problem of whether or not
10 as of last Monday, the Bureau of Alcohol, Tobacco and
11 Firearms had Michael Soto under its custody and control and
12 really had him in the palm of his hand, and he was
13 unavailable for Mr. Seffern to call as a witness in this
14 case.

15 The discussion of what the payment is and
16 what the relationship between A.T.F. and Michael Soto is, is
17 clearly addressed to the situation as it was last Monday.
18 It is totally irrelevant, at that point, to stick in any-
19 thing about the payment of \$525 and Mr. Tolentino was
20 asked about it on the stand and he said it straightfor-
21 wardly. That was the first time it had ever gone before
22 this jury and Mr. Tolentino was perfectly open and direct
23 about it and an affidavit done for an entirely different
24 purpose in response to an issue raised by Mr. Seffern, I
25 think is just utterly the beside the point on that.

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2 UNITED STATES OF AMERICA
3 vs.
4 LOUIS SOTO, RICARDO FONDEUR,
5 JOSE DELVAS, DAVID RODRIGUEZ

February 26, 1976

6 CHARGE OF THE COURT

7 THE COURT: (Motley, D.J.) Ladies and gentlemen,
8 first of all, I would want to thank each of you for the
9 careful attention which you have given throughout the
10 trial and to thank you for your patience. I know that in
11 order to serve on this jury each of you has had to make
12 some personal or business sacrifice, but I believe that
13 I told you when the trial commenced that trial by jury
14 is a basic and cherished institution in our system and
15 that when you serve on a jury, you are playing a vital
16 role in the administration of justice and the preservation
17 of the rule of law, so that I am sure that any sacrifice,
18 whether business or personal, that you have had to make
19 in order to serve on this jury, that you were glad to do
20 so in the interests of the fair and impartial administra-
21 tion of justice.

22 Now, before formally beginning the charge, I
23 would like to thank counsel on both sides for their
24 patience and to congratulate each of them on the high
25 degree of professional skill which each has demonstrated

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2 throughout this trial.

3 I trust that you will bear with me now, ladies
4 and gentlemen, and give me that same degree of attention
5 which you have given throughout the trial so that you
6 may carefully understand the legal principles which you
7 are to apply to the facts in this case as you find them.

8 Now, as you approach the performance of your
9 function in this case, that is, the determination of the
10 guilt or innocence of each of these defendants separately,
11 please remember that it is your duty to weigh the evidence
12 calmly and dispassionately without sympathy or prejudice
13 for or against either the Government or any of these
14 defendants. You must bear in mind that every defendant
15 appearing before this Court is entitled to a fair and
16 impartial trial regardless of his occupation or station in
17 life.

18 Now, the fact that the Government is a party here,
19 that the prosecution is brought in the name of the United
20 States of America, entitles it to no greater consideration
21 than that accorded to any other party to a lawsuit. By
22 the same token, it is entitled to no less consideration
23 and that is because under our system all parties, both the
24 Government and individuals alike, stand equal before the
25 law.

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2 Now, my function is to instruct you as to the
3 law applicable to this case and you should accept the law as
4 I state it to you in these instructions and apply it to the
5 facts as you find them.

6 Now, the logical result of that application is
7 a verdict in the case which must be returned as to each
8 defendant separately and as to each count in which a
9 defendant is named separately. I want to caution you
10 that you are not to single out any one instruction alone
11 as stating the law, but you must consider these instructions
12 as a whole.

13 You are not to assume that I have any opinion
14 as to the guilt or innocence of any of these defendants
15 or the truth or falsity of any of the charges. The fact
16 that I have denied motions or granted motions in the course
17 of a trial is not to be taken by you as an indication
18 that the defendants or any of them is believed by the Court
19 to be guilty or innocent. Now, these motions, as I told
20 you at the beginning of the trial, have to do with ques-
21 tions of law and the lawyers have a duty to make motions
22 and objections throughout the trial -- that's why they
23 are here, to represent their clients -- and my ruling on
24 those motions and objections have to do with questions of
25 law and not questions of fact.

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2 Now, if during the course of the trial a question
3 was asked and an objection interposed and I sustained the
4 objection, you are to disregard the question and any
5 alleged facts contained in the question.

6 Similarly, if I ruled that an answer be stricken
7 from the record, you are to disregard both the question
8 and the answer in your deliberations.

9 Now, the fact that I may refer to some of the
10 testimony or some of the exhibits or some of the stipula-
11 tions during the course of these instructions does not
12 mean that I think that that is the only evidence you
13 should consider or the most important evidence. In deciding
14 the guilt or innocence of these defendants, you must
15 consider all the testimony, both direct and cross-examina-
16 tion, and all the exhibit as well as all the stipulations
17 and you must consider the contentions of both parties as
18 set forth in their opening statements or in the summations,
19 which you have just heard.

20 Now, you as jurors, are the sole and exclusive
21 judges of the facts in this case. That means that you
22 pass upon the weight of the evidence; you determine the
23 credibility of the witnesses who testify here before you;
24 you resolve such conflicts as there may be in the evidence
25 and you draw such reasonable inferences as may be warranted

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2 by the testimony and other evidence in the case.

3 Again with respect to any matter of fact, it is
4 your recollection and yours alone that governs. Anything
5 that counsel for the Government may have said or counsel
6 for any defendant may have said, or anything which I may
7 have said with respect to any factual matter, whether
8 stated in a question, in argument or in a summation, is
9 not to be substituted for your own independent recollection
10 of what the facts in this case show.

11 Now, there are four counts, and "counts" is just
12 another word for "charges." There are four charges in the
13 information and your verdict on each charge must be based
14 solely on the evidence in a case.

15 As I told you repeatedly, the evidence in the
16 case consists of three things: The testimony which you
17 heard from the witnesses who testified right here before
18 you, the exhibits which were actually received into
19 evidence and the stipulations as to certain facts which
20 the lawyers entered into.

21 Your verdict as to each count must be unanimous
22 and must be either "Guilty" or "Not guilty" and must
23 be based solely on the evidence in the case and the
24 Court's instructions as to the law.

25 Now, the information in this case names four

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defendants: Louis Ruto, Ricardo Fondcur, Jose Delvas and David Rodriguez. Each defendant is named in all four counts of the information except Jose Delvas, who is named in Counts 1 and 2 only. Consequently, your verdict as to the defendant Delvas must be returned as to Counts 1 and 2 only.

Now, in determining the guilt or innocence of each defendant separately, you must bear in mind that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately and with respect to him solely on the evidence presented against him or the lack of evidence. You must also consider the evidence as to each count separately. You must not be influenced to infer guilt merely because several persons are tried jointly rather than separately.

Now, as I have told you, you as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You know, of course, that there is no automatic way to decide who is telling the truth and who is not. Credibility can be equated with believability and reliability. If a witness is credible, you say he is believable and reliable. If a witness is incredible, you say he is unbelievable. There is nothing mysterious about these words.

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2 Now, by what yardstick are you to judge the
3 credibility of the witnesses? Each of you has given
4 careful attention to the testimony as it came from the
5 witnesses themselves. You observed the witnesses. Issues
6 of fact are presented for your determination and to a
7 large extent the resolution of them depends upon the
8 credibility which you attribute to the witness' testimony
9 and the support or lack of support that that testimony
10 received from other evidence in the case. Now, an issue
11 of fact is presented, for example, when one witness
12 testifies that a certain event occurred and another witness
13 testifies that it did not occur.

14 Now, your duty, therefore, is to decide the dis-
15 puted issues of fact. In doing so, use your logic, your
16 reason and your common sense. Do not be sidetracked or
17 diverted or distracted by what you consider to be a minor
18 or insignificant detail or irrelevancy, or by what you
19 consider to be an appeal not to your reason or logic,
20 but to mere sentimentality or unthinking passion. I
21 repeat, use your common sense.

22 You should carefully scrutinize all the testimony
23 given, both direct and cross-examination, the circumstances
24 under which each witness has testified and every matter
25 in evidence which tends to show whether a witness is worthy

1 .glm 3

2 of belief. Consider each witness' intelligence, motive
3 and state of mind and demeanor and manner while on the
4 witness stand. Consider the witness' ability to observe
5 the matters as to which he has testified and whether he
6 impresses you as having an accurate recollection of these
7 matters. Consider also any relation each witness may
8 bear to either side of the case, the manner in which each
9 witness may be affected by the verdict and the extent
10 to which, if at all, each witness is either supported or
11 contradicted by other evidence in the case. Inconsistencies
12 or discrepancies in the testimony of a witness or between
13 the testimony of a witness or between the testimony of
14 different witnesses may or may not cause the jury to
15 discredit such testimony. Two or more persons witnessing
16 an incident or a transaction may see or hear it differently
17 and innocent misrecollection, like failure of recollection,
18 is not an uncommon experience.

19 In weighing the effect of a discrepancy, always
20 consider whether it applies to a matter of importance or
21 an unimportant detail and whether that discrepancy results
22 from innocent error or intentional falsehood.

23 In determining the credibility and weight to be
24 given the testimony of any witness, you must also consider
25 the testimony of the Government witnesses. The mere fact

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that they are employees of the Government entitles them to no more and no less consideration than that accorded any other witness, nor should you be influenced by the number of witnesses a side has called or the number of documents received in evidence. It is the quality of the testimony and other evidence which counts, not the quantity.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you think it deserves. If you find that any witness, and this applies to all witnesses, has willfully testified falsely as to any material matter you may reject the entire testimony of that witness or you may accept such part or portion as may commend itself to your belief or which you find corroborated by other evidence in the case.

Now, the law does not compel a defendant in a criminal case, as I told you before, to take the witness stand and to testify and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify. However, a defendant who wishes to testify may do so and is a competent witness. The defendant's testimony is to be judged in the same way as that of any other witness.

Now, there has been testimony and evidence in this case to the effect that the Government used undercover

agents and in one instance employed or paid an informant in the course of its activities in this case. I instruct you that law enforcement agencies frequently use and avail themselves of the services of undercover investigators and paid informants in attempting to enforce the law. The use of such methods and persons is not in any way forbidden by the law. Whether you and I disapprove of that is really beside the point, provided that such services in no way impinge upon the rights of a defendant. You are not being asked to determine whether or not you agree with the policy of using undercover agents or informants. The testimony of an informer or undercover agent is to be judged in the same way as the testimony of any other witness and given such weight as you think it deserves.

Now, during the course of this case, we had an expert witness to testify and so I want to say a word about the testimony of an expert witness. When a case involves a matter of science or art or some field requiring special knowledge or skill not ordinarily possessed by the average person, an expert is permitted to state his opinion for the information of the Court and jury. The opinions stated by an expert who testifies, are usually based upon particular facts as the expert himself observed them and testified to before you, or based upon facts which an

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2 attorney may have asked him to assume for the purpose of
3 expressing an opinion based upon the assumed facts.

4 , you may reject an expert's opinion if you
5 find the facts to be different from those which form the
6 basis of his opinion. You may also reject his opinion
7 if after careful consideration of all the evidence in
8 the case, expert and other, you disagree with the opinion.
9 In other words, you are not required to accept an expert's
10 opinion to the exclusion of the facts and circumstances
11 disclosed by other testimony. Such an opinion is based
12 upon the same rules concerning reliability and credibility
13 as the testimony of any other witness. It is to be given
14 any weight which you believe it should have and the opinion
15 of an expert is given to assist you in reaching a proper
16 conclusion, but it is not controlling upon your judgment.

17 Now, as you well know, each defendant who is
18 on trial here has entered a plea of "Not guilty" to each
19 charge made against him in the information. Consequently,
20 as I told you repeatedly at the beginning of the trial, if
21 a defendant is to be convicted on any count in which he
22 is named, the Government has the burden of proof and
23 that is, to prove the defendant guilty of that particular
24 charge in which he is named, beyond a reasonable doubt.

25 Now, that is a burden that never shifts. It

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2 remains upon the Government throughout the entire trial.
3 As I told you before, in a criminal case, a defendant does
4 not have to prove his innocence. On the contrary, a
5 defendant in a criminal case is presumed to be innocent
6 of the charges made against him. This presumption of
7 innocence was in the defendant's favor at the start of the
8 trial. It continued in his favor throughout the trial and
9 is in his favor even as I instruct you now. It remains
10 in his favor even during the course of your deliberations
11 in the jury room.

12 Now, this presumption of innocence, as I
13 told you at the beginning, is removed only if and when
14 after your deliberations in the jury room you come to
15 the conclusion that the Government has sustained its burden
16 of proof, and that is, to prove the defendant guilty beyond
17 a reasonable doubt.

18 The question that naturally comes up is: What
19 is a reasonable doubt? The words almost define themselves.
20 Reasonable doubt is a doubt founded in reason and arising
21 out of the evidence in the case or the lack of evidence.
22 It is a doubt which a reasonable person has after care-
23 fully weighing all the evidence. The kind of doubt
24 which would make one hesitate to act. It means a doubt
25 that is substantial and not merely shadowy. Reasonable

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2 doubt is one which appeals to your reason, your judgment,
3 your common sense and your experiences in life. It is not
4 caprice, whim or speculation. It is not an excuse to
5 avoid the performance of an unpleasant duty. It is not
6 the sympathy for a defendant.

7 Now, if after a fair and impartial consideration
8 of all the evidence you can candidly and honestly say that
9 you are not satisfied of the guilt of a particular defendant
10 that you are then considering and that you do not have
11 an abiding conviction as to that particular defendant's
12 guilt, such a conviction as you would be willing to act
13 upon unhesitatingly in important and weighty matters in
14 the personal affairs of your own life, then you do have a
15 reasonable doubt and in that circumstance, it is your duty
16 to acquit that particular defendant.

17 On the other hand, if after such a fair and
18 impartial consideration of all the evidence, you can candidly
19 and honestly say that you are satisfied of the guilt of
20 the defendant, that you do have an abiding conviction of
21 that particular defendant's guilt, such a conviction as
22 you would be willing to act upon unhesitatingly in important
23 and weighty matters in the personal affairs of your own
24 life, then you have no reasonable doubt and in that cir-
25 cumstance, you may convict the defendant.

1 rglm 15

2 A reasonable doubt does not mean a positive
3 certainty or beyond all possible doubt. It is practically
4 impossible for any person to be absolutely and completely
5 convinced of any controverted fact which by its nature
6 is not susceptible to mathematical certainty.

7 In consequence, the law in a criminal case is
8 that it is sufficient if the guilt of a defendant is
9 established beyond a reasonable doubt, not beyond all
10 possible doubt.

11 You must remember that you may not vote to
12 convict based upon suspicion or conjecture or speculation,
13 no matter how strong. A conviction can only be based
14 upon actual proof of guilt beyond a reasonable doubt and
15 if the proof does not meet that standard, you must acquit.

16 Now, as I told you when you were being selected
17 and before the trial commenced, an information is not
18 proof or evidence; it is merely an accusation, that is
19 a charge. The use of an information is a method or
20 technique or procedure which we employ in our system which
21 results in bringing one charged with a crime before the
22 Court and then their guilt or innocence is determined by
23 a trial jury such as you are. Therefore, the charges
24 made in the information have no evidentiary value in and
25 of themselves and you must not consider a charge as proving

1 rglm 16

2 or tending to prove that a crime has been committed by a
3 particular defendant.

4 Now, as I told you, this information has four
5 charges and what I am going to do shortly is to read each
6 charge or count to you and then enumerate for you the
7 elements of each charge which you must find that the Govern-
8 ment has established beyond a reasonable doubt before you
9 could find a particular defendant guilty of that particular
10 charge.

11 First I want to summarize the charge generally:

12 The first count charges a conspiracy. It
13 charges that the defendants, Louis Soto, Ricardo Fondeur,
14 Jose Delvas and David Rodriguez conspired to violate the
15 federal gun control laws. I shall call this the conspiracy
16 count as I have said.

17 The second count charges Louis Soto, Ricardo
18 Fondeur, Jose Delvas and David Rodriguez with engaging
19 in the business of dealing in firearms without a license.

20 The third count charges Louis Soto, Ricardo
21 Fondeur and David Rodriguez with possession of a firearm
22 not registered in the National Firearms and Transfer Record.

23 The fourth count charges Louis Soto, Ricardo
24 Fondeur and David Rodriguez with knowingly transferring a
25 firearm when none had filed with the Secretary of the

1 rglm 17

2 Treasury or his delegate, a written application for the
3 transfer and registration of the firearm.

4 Now, the first count, as I have said, is a
5 conspiracy count. The second, third and fourth counts
6 are what we call "substantive" counts. They charge
7 specific violations of federal law. I will first deal
8 with each of these substantive counts and then I will deal
9 with the conspiracy count.

10 In order to convict a defendant on any count
11 you must find beyond a reasonable doubt that he acted
12 unlawfully, knowingly and willfully. Unlawfully means
13 "contrary to law." An act is done knowingly if it is
14 done voluntarily and purposefully and not because of
15 mistake, accident, mere neglect or other
16 innocent reason. An act is done willfully if it is
17 done knowingly and deliberately, intentionally and with
18 an evil purpose or motive.

19 In determining whether a defendant has acted
20 willfully, it is not necessary for the Government to prove
21 that the defendant knew that he was breaking any particular
22 law or any particular rule. It must, however, prove a bad
23 purpose or motive on the part of a defendant.

24 Now, knowledge, willfullness and intent of a
25 defendant need not be proved by direct evidence. Like any

1 rglm 18

2 other fact in issue, knowledge, willfullness and intent
3 may be established or proved by circumstantial evidence.

4 There are two classes of evidence recognized and
5 accepted in courts of justice, upon either of which you
6 may find an accused guilty of a crime: One is called
7 "direct evidence"; the other is called "circumstantial
8 evidence." Direct evidence tends to show the fact in issue
9 without need for any other amplification, although, of
10 course, there is always a question whether that evidence
11 is to be believed. Circumstantial evidence, on the other
12 hand, tends to show other facts from which the fact in
13 dispute may reasonably be inferred. It is that evidence
14 which tends to prove the fact in issue by proof of other
15 facts which have a legitimate tendency to lead the mind
16 to infer that the fact sought to be established is true.

17 In other words, circumstantial evidence consists
18 of facts proved from which the jury may infer by a process
19 of reasoning other facts in dispute. It is not necessary
20 that the participation of a defendant be shown by direct
21 evidence. The defendant's connection to a crime charged
22 may be inferred from such facts and circumstances in
23 evidence as would legitimately tend to support such an
24 inference. Knowledge and willfullness and intent of a
25 defendant, as I said, need not be proved by direct evidence.

rglm 19

Like any other fact in issue, it may be established by circumstantial evidence.

In every criminal case it is necessary for the Government to prove beyond a reasonable doubt the defendant on trial had the necessary criminal knowledge, willfulness and intent. Questions concerning a defendant's knowledge and willfulness and intent involve proof of a defendant's state of mind at the time of the alleged crime. It is obviously impossible to prove directly the operation of a defendant's mind because you cannot look into a person's mind and see what his or her intentions are or were, but the proof of the circumstances surrounding a defendant's activities may well supply an adequate and convincing basis for finding that a defendant acted knowingly, willfully and intentionally.

In other words, the actions of a defendant must be judged in their time and place. Just as the full meaning of a word is commonly understood only in relation to other words in the sentence or in its context, so the meaning of a particular act or conduct on the part of a defendant may depend upon the circumstances surrounding that defendant's act or conduct.

In determining the issue of knowledge, willfulness and intent, you are entitled to consider any statements

rglm 20

made by the defendant which are in evidence, and any acts done by the accused which are in evidence, and all other facts and circumstances in evidence which may aid you in determining a defendant's state of mind. You may consider such things as the age, background, occupation and experience of a defendant and whether such facts make it likely or unlikely, probable or improbable that a defendant fully and precisely understood what he was doing in regard to a transaction and where relevant in relation to others.

Now, as I told you, I am going to deal first with the substantive counts, Counts 2, 3 and 4, and then I am going to deal with the conspiracy count.

Now, Count 2, the gun-dealing charge. That reads as follows:

"The United States Attorney further charges:

"From on or about April 9, 1975 and continuously thereafter up to and including May 15, 1975, in the Southern District of New York, Louis Soto, Ricardo Fondaur, Jose Dalvas and David Rodriguez, the defendants, not being licensed dealers, did unlawfully, willfully and knowingly engage in the business of dealing in firearms and ammunition."

The information cites in connection with that

1 rglm 21

2 charge Title 18, United States Code, Section 922(a)(1) and
3 Section 2. Title 18, United States Code, Section 922(a)(1)
4 provides as follows:

5 "It shall be unlawful for any person, except a
6 licensed importer, a licensed manufacturer or licensed
7 dealer, to engage in the business of importing, manufacturing
8 or dealing in firearms or ammunition."

9 That's the statute that the defendants are
10 charged with violating in Count 2.

11 In order to find any defendant guilty as charged
12 in Count 2, you must find that the Government has proved
13 each of the following three elements beyond a reasonable
14 doubt:

15 First; that from on or about April 9, 1975 and
16 continuing up to on or about May 15, 1975, the defendant
17 engaged in the business of dealing in firearms.

18 Second; that he did so knowingly and willfully.

19 Third; that the defendant did not have a federal
20 firearms license as an importer, manufacturer or dealer.

21 Now, the statute defines the term "dealer" as:
22 "Any person engaged in the business of dealing in firearms
23 or ammunition at wholesale or retail."

24 The term "licensed dealer" is defined to mean:
25 "Any dealer who is licensed under the federal law."

rglm 22

Firearm is defined to mean: "Any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive."

As I have already told to you, it is charged in the information that the defendants were engaged in the business of dealing in firearms without a license. I charge you now that the statute in question does not set forth specifically a definition of these key words: "Engaging in the business of dealing in firearms." Therefore, you are to apply your common sense and general experience in determining whether or not the defendants engaged in the business of dealing in firearms.

I charge you further that there are certain well-settled characteristics of engaging in business which you must apply in reaching your decision. Business is that which occupies the time, attention and labor of men for the purpose of a livelihood or profit. To engage in business implies an element of continuity or habitual practice. One who is engaged in the business of dealing in firearms must have guns on hand or be ready and able to procure them and sell them to such persons as might accept them as customers.

I charge you further on this subject, that

rglm 23

engaging in business does not mean the performance of a single disconnected business act, nor does it mean one or more isolated transactions. If you do not find that the defendants were engaged in the business of dealing in firearms, then whether or not it has been shown that they sold one or more firearms, I charge you that you must acquit the defendants.

An isolated sale in one's home does not place an individual in the business of dealing in firearms in the absence of other characteristics indicative of such business as I have just indicated.

Now, the second element of the offense was that the defendants engaged in the business knowingly and willfully and I have already explained those terms to you. However, mere ignorance of the existence of a law is no excuse for its violation.

The third element, that the defendants did not have a federal firearms license as an importer, manufacturer or dealer, is self-explanatory. However, it has been stipulated in this case that the defendants had not procured a federal firearms license as an importer, manufacturer or dealer and consequently this is not disputed. None the less, it is a material element of the crime and you must find it to be the fact in order to convict.

1 rqlm 24

2 Now, the stipulation was read to you by Mr.
3 Macbeth, but I must caution you that these stipulations
4 with respect to this are not proof that the weapon described
5 therein is in fact a shotgun or firearm, as I shall define
6 those terms for you. It was merely a stipulation that
7 somebody in Washington had checked the records and had
8 found that the defendants had not procured a license.

9 Now, with respect to Count 2. If you find that
10 the Government has failed to prove beyond a reasonable
11 doubt any one of the three elements of that crime, that
12 is, of unlawfully engaging in the business of dealing in
13 firearms, which I have just enumerated and discussed for
14 you as to a particular defendant whom you are then con-
15 sidering, you must acquit that defendant. You must find
16 him "Not guilty."

17 If on the other hand, you find that the Govern-
18 ment has proved to your satisfaction beyond a reasonable
19 doubt each of these three elements as to a particular
20 defendant, then you may convict that particular defendant.

21 Now as to Count 3. I shall first read that count:

22 "The United States Attorney further charges:

23 "On or about April 9, 1975, in the Southern
24 District of New York, Louis Soto, Ricardo Fondeur and
25 David Rodriguez, the defendants, unlawfully, willfully, and

1 rglm 25

2 knowingly possessed a firearm, to wit, a Mosserberg 20-
3 gauge, sawed-off shotgun, Model 185K-A, no serial number, *
4 which firearm was not registered to any of the said
5 defendants in the National Firearms Registration and
6 Transfer Record."

7 Now, the indictment cites in this connection
8 Title 26, United States Code, Section 5861(d)
9 which provides in pertinent part as follows:

10 "It shall be unlawful for any person to possess
11 a firearm which is not registered to him in the National
12 Firearms Registration Record."

13 Now, in order to find the defendants Louis
14 Soto, Ricardo Fondeur or David Rodriguez guilty of the
15 crime charged against them in Count 3, that is the
16 possession count, you must find beyond a reasonable doubt
17 each of the following three elements:

18 First; that on or about April 9, 1975 the
19 particular defendant you are considering, had possession
20 of a firearm, as that term will be defined.

21 Second; that the firearm possessed was not
22 then registered to the defendant in the National Firearms
23 Registration and Transfer Record.

24 Third; that the defendant's possession was
25 unlawful, willful and knowing, as I have previously defined

1 rglm 26

2 those forms for you.

3 Now, as to the first element. That is that the
4 defendants Soto, Fondeur and Rodriguez possessed a firearm.
5 The word "possessed" has its everyday common meaning.
6 That is, to have something within one's control, either
7 physically or constructively. Physical custody obviously
8 meets the statutory requirement of possession. To
9 possess a gun also means to have dominion and control of
10 the gun, such that the defendant could claim or move the
11 gun himself or cause others to move it as his agent.

12 In short, it's not necessary for the Government
13 to prove that the defendant has actual physical possession
14 of the gun. Proof of constructive possession, as I have
15 just defined it, is sufficient to meet the statutory
16 requirement.

17 The law also recognizes that possession may be
18 sole or joint. If one person alone has actual or con-
19 structive possession of a thing, its possession is sole.
20 If two or more persons share actual or constructive possess-
21 ion of a thing, possession is joint.

22 If you find beyond a reasonable doubt from the
23 evidence that the defendant you are then considering
24 either alone or jointly with others had actual or con-
25 structive possession of the sawed-off shotgun, then you

1 rglm 27

2 may find that the gun was in the possession of the particular
3 defendant within the meaning of the statute. Now, the
4 statute defines, that is Title 26, United States Code,
5 Section 5845(G) defines the term "shotgun" as follows:

6 The term "shotgun" means: "A weapon designed
7 or re-designed, made or remade and intended to be fired
8 from the shoulder and designed or re-designed and made or
9 remade to use the energy of the explosive in a fixed
10 shotgun shell to fire through a smooth bore a number
11 of projectiles, ball shot, or a single projectile for
12 each pull of the trigger and shall include any such
13 weapon which may be readily restored to fire a fixed shot-
14 gun shell."

15 Now, the statute, Title 26, United States Code
16 Section 5845(a)(2) defines a firearm as follows:

17 "A weapon made from a shotgun, if such weapon
18 as modified, has an overall length of less than 26 inches
19 or a barrel of less than 18 inches in length."

20 Now, you must find that the Government has
21 proved beyond a reasonable doubt that Government's Exhibit
22 2A is a shotgun and, moreover, that it is of such a size
23 as to make it a firearm as that term is defined in Section
24 5485(a)(2).

25 Now, as to the second element, the evidence in

rglm 28

this case contains a certificate or a stipulation showing that after a diligent search of the National Fire Arms Registration and Transfer Record no record was found that the shotgun which the Government claims was involved in this case was registered to the defendant Soto, Fondeur or Rodriguez. From such evidence you may find that the Government has sustained its burden of proving non-registration of the fire arm beyond a reasonable doubt. However, it is up to you to determine what evidence you will accept and what weight you will give to any evidence presented to you in this case.

Now, as to the third element, unlawfully, willfully and knowingly, I have already explained those terms.

Now with respect to Count 3, if you find that the Government has failed to prove beyond a reasonable doubt any one of the three elements of the crime of unlawfully possessing a fire arm which I have just enumerated and discussed in detail as to a particular defendant whom you are then considering, you must find that defendant not guilty of the charge contained in Count 3. If, on the other hand, you find that the Government has proved to your satisfaction beyond a reasonable doubt each of these three elements of the crime charged in Count 3 as to the particular defendant whom you are then considering, then

rglm 29

you may convict that particular defendant.

I shall now read Count 4 of the information:

"The United States Attorney further charges:

"On or about April 9, 1975, in the Southern District of New York, Louis Soto, Ricardo Fondeur and David Rodriguez, the defendants, unlawfully, willfully and knowingly transferred a firearm, to wit, a Mosserberg 20-gauge, sawed-off shotgun, Model 185K-A, no serial number, in violation of the provisions of Title 26, United States Code, Section 5812, in that, none of the said defendants filed with the Secretary of the Treasury or his delegate a written application, in duplicate, for the transfer and regulation of the firearm to the transferee on the application form prescribed by the Secretary or his delegate."

Now, with respect to Count 4, the information cites Title 26, United States Code, Section 5861(a), as the statute violated by the three defendants in that count. Now, that statute provided, in pertinent part, as follows:

"It shall be unlawful for any person to transfer a firearm in violation of the law."

Now, included among the provisions of the law is Section 5812 which provides, in pertinent part, as follows:

"A firearm shall not be transferred unless:
one, the transferor of the firearm has filed with the

1 rglm 30

2 Secretary or his delegate a written application, in duplicate,
3 for the transfer and registration of the firearm to the
4 transferee on the application form."

5 Now, Count 4 charges that the three defendants,
6 Soto, Fondeur and Rodriguez, transferred the sawed-off
7 shotgun without filing the application required by law.

8 In order to find a defendant named in Count 4
9 guilty as charged, you must find that the Government has
10 established each of the following elements beyond a reason-
11 able doubt:

12 First; that on or about April 9, 1975 the
13 particular defendant transferred a firearm as that term
14 is defined in the statute. As with Count 3, you must
15 first find that the weapon identified as Government's
16 Exhibit 2A is a shotgun as I have defined that term for
17 you and also that it has an overall length of less than
18 26 inches or a barrel of less than 18 inches in length.

19 Second; that the transfer was in violation of
20 law because the defendant had not filed a written applica-
21 tion with the Secretary of the Treasury or his delegate
22 for the transfer and registration of the firearm. In
23 connection with this count, the Government relies on the
24 certificate of non-registration which I talked about
25 earlier.

rglm 31

Third; that the transfer was unlawful, willful and knowing, as those terms have already been defined.

Now, the term "transfer" in the statute has a meaning close to its everyday meaning. It is defined by Title 26, United States Code, Section 5485(j) as follows:

"The term 'transfer' and various derivatives of such word shall include selling, assigning, pledging, leasing, loaning, giving away or otherwise disposing of."

Now, with respect to Count 4, if you find that the Government has failed to prove to your satisfaction beyond a reasonable doubt any one of these three essential elements of the crime of unlawfully transferring a firearm which I have just enumerated and discussed as to a particular defendant whom you are then considering, you must find that defendant not guilty of the charge contained in this count. If, on the other hand, you find that the Government has proved to your satisfaction beyond a reasonable doubt each of these three elements of the crime charged in Count 4 as to the particular defendant whom you are then considering, then you may convict that particular defendant.

Now, with respect to each one of these substantive counts which I have just read to you and discussed,

rglm 32

the indictment charges in addition to the statutes which I have already spoken of, that each defendant violated what we call "the aiding and abetting statute" in connection with each one of those counts.

Now, the aiding and abetting statute is Title 18, United States Code, Section 2, and that statute provides in pertinent part as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

In other words, it is not necessary for the Government to show that it has established all elements of the crime as to a particular defendant or that the defendant physically committed the crime himself. This is true because of the aiding and abetting statute which I have just read to you. Accordingly, you may find a defendant guilty of one of the three substantive counts if you find beyond a reasonable doubt that another person actually committed the offense charged and the particular defendant named in that count whom you are then considering aided and abetted the person who actually committed the crime.

Now, there is no particular rule as to what acts of a defendant would make him an aider and an abettor.

1 rglm 33

2 It is enough, however, if you find that a defendant knowingly
3 associated himself in some manner with the illegal venture.
4 He actually participated in it as something he wished to
5 bring about or that he sought by his actions to make
6 succeed. In this connection you may consider whether
7 the defendant had a stake in the venture. In other words,
8 the law is that one who aids and abets another with know-
9 ledge of the unlawful nature of the transaction is just
10 as guilty of that crime as if he committed the crime him-
11 self.

12 To find a defendant guilty of aiding and abetting,
13 you must of course find something more than mere knowledge
14 on his part that a crime has been committed. Thus, a
15 mere spectator at a crime is not a participant. Consequently,
16 in order to find a defendant guilty of aiding and abetting,
17 you must find that the particular defendant you are then
18 considering with knowledge of the unlawful purpose in
19 some way associated himself with the illegal activity; that
20 he knowingly participated in it as something he wished to
21 bring about and that he knowingly by his actions endeavored
22 to make it succeed.

23 Now at this time we will take a five-minute recess
24 and then I will come to the conspiracy count which is the
25 first count in the indictment which I have left for the

rglm 34

end. The jury is excused for five minutes.

(Recess.)

THE COURT: I shall now read the first count of the indictment, which is the conspiracy count:

"The United States Attorney charges:

"1. From on or about April 9, 1975 and continuously thereafter up to and including the date of the filing of this form, in the Southern District of New York, Louis Soto, Ricardo Fondeur, Jose Delvas and David Rodriguez, the defendants, unlawfully, willfully, and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 922 (a, (1), of Title 18, United States Code.

"2. It was part of said conspiracy that the said defendants unlawfully, willfully and knowingly would and did engage in the business of dealing in firearms and ammunition, none of them being a licensed dealer.

"Overt Acts:

"In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

"1. On or about April 9, 1975, defendant Louis Soto accepted approximately \$190 for the purchase of two firearms, to wit, a 20-gauge Mossberg sawed-off shotgun

1 rglm 35

2 and a 22-caliber revolver, H and R Model 923, bearing
3 Serial No. L37748.

4 "2. On or about April 9, 1975, defendant Louis
5 Soto gave defendant David Rodriguez and defendant Ricardo
6 Fondeur approximately \$150 from the payment obtained for
7 the firearms described in Paragraph 1.

8 "3. On or about May 7, 1975, defendant Louis
9 Soto offered for sale a 38-caliber revolver.

10 "4. On or about May 7, 1975, defendant Jose
11 Delvas accepted approximately \$150 as payment for the
12 firearm described in Paragraph 3 above.

13 "5. On or about May 8, 1975, defendant Louis
14 Soto attempted to locate a firea under the stairwell
15 at 990 Leggett Avenue, Bronx, New York.

16 "6. On or about May 8, 1975, defendant David
17 Rodriguez gave defendant Louis Soto a 38-caliber revolver
18 with the serial number obliterated.

19 "7. On or about May 8, 1975, defendant Louis
20 Soto accepted approximately \$200 as payment for the fire-
21 arm described in Paragraph 6 above."

22 In this connection the information cites Title
23 18, United States Code, Section 371, which is the conspiracy
24 statute and that reads in pertinent part as follows:

25 "If two or more persons conspire either to commit

1 rglm 36

2 any offense against the United States, and one or more of
3 such persons do any act to effect the object of the
4 conspiracy, each is guilty of a crime."

5 Now, the information charges that all four
6 defendants conspired to violate the federal gun control
7 statute, specifically Title 18, United States Code,
8 922(a)(1), which I read before, but which I will read
9 again:

10 "It shall be unlawful for any person, except
11 a licensed importer, a licensed manufacturer or a licensed
12 dealer, to engage in the business of importing, manufactur-
13 ing or dealing in firearms or ammunition."

14 Now, that's the statute that the defendants
15 are charged with conspiring to violate.

16 Now, what is a conspiracy? A conspiracy is a
17 collective criminal agreement, a partnership in crime. A
18 conspiracy presents a greater potential threat to government
19 and society than acts committed by a lone wrongdoer. That
20 is why the Congress has made conspiracy to violate a
21 federal statute a separate crime, separate and distinct
22 from any substantive offense which might result from the
23 conspiracy. Concerted action for criminal purposes often,
24 not normally, makes possible the attainment of ends more
25 complex than those which an individual acting alone could

1 rglm 37

2 accomplish.

3 Moreover, group association increases the like-
4 lihood that the criminal objective will be successfully
5 realized and renders detection more difficult than in the
6 instance of a lone wrongdoer. It is because of these
7 and other reasons as I have said, that Congress has made
8 conspiracy or concerted acts to violate a federal law a
9 separate crime.

10 Now, in order to prove the crime of conspiracy,
11 the Government must establish to your satisfaction each
12 of the following four essential elements of that crime:

13 First; the existence of the conspiracy as alleged
14 in Count 1.

15 Second; that it was a purpose of the conspiracy
16 to violate Title 18, United States Code, Section 922.

17 Third; that the particular defendant you are
18 considering, knowingly and willfully became a participant
19 in, that is, a member of the conspiracy.

20 Fourth; that at least one of the co-conspirators
21 knowingly committed at least one of the overt acts set
22 forth in the indictment in furtherance of the conspiracy
23 and during the period of the conspiracy alleged in the
24 information.

25 Now I shall discuss each of these elements in

1 rglm 38

2 greater detail. The first, that is the existence of the
3 conspiracy alleged in the information.

4 Now, in order to establish a conspiracy, the
5 Government is not required to show that two or more persons
6 sat around a table and entered into a solemn compact,
7 either orally or in writing, stating that they have formed
8 a conspiracy to violate the law setting forth details of
9 the plan, the means by which the unlawful project is to
10 be carried out or the part to be played by each co-con-
11 spirator. Indeed, it would be extraordinary if there were
12 such a formal agreement or specific oral statement. Your
13 common sense will tell you that when men in fact undertake
14 to enter into a criminal conspiracy much is left to
15 unexpressed understanding. Conspirators do not usually
16 reduce their agreements to writing or acknowledge them
17 before a notary public nor do they publicly broadcast
18 their plans. From its very nature, a conspiracy is almost
19 invariably secret in its origins and in its execution.

20 Therefore, it is sufficient if you find that
21 two or more persons in any manner through any contrivance,
22 impliedly or tacitly, come to a common understanding to
23 violate the law. Express language or specific words are
24 not required to indicate assent or attachment to a con-
25 spiracy, nor is it required to find that all the co-conspirators,

1
2 alleged in the information joined in the conspiracy in
3 order to find that a conspiracy existed. You need only
4 find that one of the defendants entered into an unlawful
5 agreement with one or more persons in order to find that a
6 conspiracy existed.

7 In determining whether there has been an unlawful
8 agreement, you may judge acts and conduct of the alleged
9 co-conspirators which are done to carry out an apparent
10 criminal purpose. The adage, "Actions speak louder than
11 words" is applicable here. Usually the only evidence
12 available of a conspiracy is that of disconnected acts,
13 which, however, when taken together in connection with
14 each other, show a conspiracy to secure a particular
15 result as satisfactorily and conclusively as more direct
16 proof. Proof concerning the accomplishment of the object
17 of a conspiracy may be the most persuasive evidence of
18 the existence of the conspiracy itself.

19 Success of the venture, if you believe it was
20 successful, may be the best proof of the existence of the
21 agreement. In this connection, it is not necessary for
22 the Government to prove the success of the conspiracy in
23 order to establish a violation of the conspiracy statute.
24 As a conspiracy is basically the agreement to violate the
25 law, it may exist even though the final objectives were never

1 rgln 40
2 accomlished.

3 In determining whether the conspiracy charged
4 in this information actually existed, you may consider the
5 evidence or the acts and conduct of the alleged conspirators
6 as a whole and the reasonable inferences to be drawn from
7 such evidence. If upon such consideration of the evidence
8 you find beyond a reasonable doubt that the minds of at
9 least two of the alleged co-conspirators met in an under-
10 standing way, that they agreed as I have explained a con-
11 spiratorial agreement to you, to work together in further-
12 ance of the unlawful scheme alleged in the information,
13 then proof of the existence of the conspiracy, but only
14 of its existence, is complete.

15 While the information charges that the conspiracy
16 began on or about April 9, 1975 and continued to on or
17 about the date of the filing of the information, which I
18 believe was about February 11, 1976, it is not necessary
19 that the Government prove that the conspiracy started and
20 ended on or about those specific dates. It is sufficient
21 if you find that in fact a conspiracy was formed and
22 existed for some substantial period of time within the
23 period set forth in the information and that at least one
24 of the overt acts was committed in furtherance of the
25 conspiracy during that period.

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An overt act which you find did occur need not have occurred on the specific date set forth in the information. You need only find that it occurred no sooner than April the 9th, 1975 and no later than February 11, 1976.

Now, with respect to the second element. The indictment charges that the conspiracy had as its object the violation of Section 922(a)(1) of Title 18, which I read to you. The Government must prove beyond a reasonable doubt that the conspiracy had as its objective the violation of that statute which prohibits one from dealing in firearms or engaging in the business of firearms without a license.

Now we come to the third element. The third element which you must consider is that the defendant who you are then considering, knowingly and willfully became a participant in, that is, a member of the conspiracy. A defendant's participation in the conspiracy, like its existence, can be inferred from such facts and circumstances in evidence as would logically sustain that inference. I want to caution you, however, that mere association of one defendant with an alleged conspirator or conspirators does not establish his participation in the conspiracy if you find that one did exist. So, too, mere knowledge by a defendant of the conspiracy or any illegal act on the part

1 rglm 43

2 said or done in furtherance of the conspiracy and it may
3 be done or said during the existence of the conspiracy
4 and in furtherance thereof and while he remains a member.

5 Simply stated, and using the partnership analogy,
6 by becoming a partner the defendant assumes all the
7 liabilities of the partnership including those which
8 occurred before he became a member. It is not required
9 that the Government show that a conspirator knew all the
10 other members of a conspiracy. A conspiracy once formed
11 is presumed to have continued until its objective was accom-
12 plished or there is some affirmative act of termination by
13 its members.

14 Once you are satisfied beyond a reasonable doubt
15 that a conspiracy as alleged existed and that the particular
16 defendant you are then considering was a member of it,
17 any act or declaration of any person whom you find was also
18 a member of the conspiracy made during its pendency and
19 in furtherance of its objectives are considered the acts and
20 declarations of all other members, even though the particular
21 defendant was not present at the time or did not know such
22 statements were made or acts done by others in furtherance
23 of the conspiracy.

24 In other words, every co-conspirator is
25 fully responsible for what every other co-conspirator does

1 rglm 42

2 of an alleged co-conspirator is not sufficient evidence to
3 establish his membership in the conspiracy. You must find
4 actual knowing participation by that defendant in the agree-
5 ment to violate the law, and as I told you before, an act
6 is done knowingly if it is done voluntarily and purposefully
7 and not because of mistake, accident, mere neglect or
8 other innocent reason.

9 An act is done willfully if it is done knowingly,
10 willfully and with evil motive or purpose. In determining
11 whether a defendant has acted willfully it is not necessary
12 for the Government to establish that the defendant knew
13 that he was breaking any particular law or any particular
14 rule. It must, however, prove that the defendant had an
15 evil motive or purpose in mind. Knowledge and willfulness
16 and intent of a defendant, as I told you before, need not
17 be proved by direct evidence. Like any other fact in
18 issue it may be established by circumstantial evidence.

19 If one conspirator joined the conspiracy after
20 it was formed and was engaged in it to a degree more limited
21 than that of other co-conspirators, he is equally culpable
22 so long as he was a co-conspirator. In other words, it is not
23 required that the person be a member of the conspiracy
24 from its very start. He may join it at any point during
25 its progress and be held responsible for all that has been

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in furtherance of the conspiracy, whether he knows about it or not and whether he specifically approved of it or not.

Now we come to the fourth and final element.

The offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators. An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that while parties might conspire and agree to do an unlawful thing they may change their minds or even abandon the project and do nothing to carry it into effect, in which event it would not be an offense.

The prosecution is not required to set forth in the information each and every act on which it relies to establish the conspiracy or the defendant's participation therein, nor is it required to prove each overt act which may have occurred during and in furtherance of the conspiracy, but it is required to prove that at least one overt act did take place here in the Southern District of New York which includes The Bronx.

The overt act need not be criminal in itself.

The overt act, however, must be an act which follows and

1 rglm 45

2 bends toward the accomplishment of the plan or scheme
3 charged in the conspiracy count and must be knowingly
4 done in furtherance of some object of the conspiracy.

5 Now, if you find that the Government has failed
6 to establish beyond a reasonable doubt any one of the
7 four elements of the crime of conspiracy as I have just
8 enumerated and discussed them for you, then you must find
9 the defendant whom you are then considering not guilty of
10 the charge of conspiracy. On the other hand, if you
11 should find that the Government has sustained its burden
12 of proving each and every one of the four elements of the
13 crime of conspiracy as I have just enumerated and discussed
14 them for you as to a particular defendant beyond a reasonable
15 doubt, then you may convict that defendant on the conspiracy
16 count.

17 Now, there has been asserted here the defense
18 of entrapment in response to the charges made in this
19 information by the defendant Louis Soto. He asserts that
20 he was the victim of entrapment by an agent of the
21 Government. Now, the word "entrapment" that I have just
22 used is a legal term and it has a technical meaning here
23 and not the meaning that one would give to it in popular
24 speech. Therefore, I must explain the word and meaning of
25 entrapment as it is used in the law.

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Criminal activity is such that sometimes stealth and strategy are necessary methods to be used by law-enforcement officers. The function of law enforcement is not only the prevention of crime, but also the detection and apprehension of criminals. Manifestly, that function does not include the manufacturing of crime by law enforcement agents. The defense of entrapment is based upon the policy of the law, not to ensnare or entrap innocent persons into the commission of a crime, but a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal.

A basic feature of entrapment is that the idea or design of committing the offense originated with a law-enforcement officer or a paid Government informer rather than with the defendant. Another feature of entrapment is that the defendant had no previous disposition, intent or purpose to commit the alleged offense. Another feature is that the law-enforcement officer or Government employee implanted in the mind of an innocent person the disposition to commit the alleged offense and instigated and instituted its commission in order that the defendant might be arrested and prosecuted.

Now, if you find that an agent or paid informer of the Government merely offered a favorable opportunity to

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the defendant for the commission of the alleged crime, such conduct on the part of the Government does not constitute entrapment. Entrapment would occur only if you find that the Government agent induced the defendant to commit the crime charged in the information and that the criminal conduct of the defendant was the product of the Government's activity. If the jury finds any credible evidence creating the reasonable possibility that a Government agent or employee instigated and incited or otherwise induced the defendant to commit the crime charged, then the Government must prove beyond a reasonable doubt that such inducement was not the cause or creator of the crime. That is, the Government must prove the defendant had been predisposed and willing to commit the crime.

In other words, expressing the same thought, while a defendant is not required to prove his entrapment beyond a reasonable doubt, the Government must prove its absence beyond a reasonable doubt and if you have a reasonable doubt as to the absence of entrapment and find a reasonable possibility of entrapment you must acquit this defendant.

If the prosecution has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offense charged and was merely awaiting a

1 rglm 48

2 favorable opportunity to commit the offense, then you may
3 find that the inducement, if any, which brought about the
4 actual offense was no more than the providing of what
5 appeared to the defendant to be a favorable or a timely or
6 convenient opening for the criminal activity in which that
7 defendant engaged. In such circumstances you may find
8 that the Government's act has not induced an innocent
9 person, but has only provided the means for the defendant to
10 effectuate or realize his own then existing purpose.

11 The central issue is whether the defendant's
12 activities in connection with the firearms, charged in
13 this information, were caused by the urging and inducing
14 of the Government agent or whether the agent simply afforded
15 the defendant the opportunity to commit the crime. If you
16 find that the defendant was induced to commit the crime
17 charged by the acts and conduct of the Government agents
18 then he must be acquitted. On the other hand, if the
19 Government has proved beyond a reasonable doubt that he was
20 ready and willing to commit the crime, he was simply
21 afforded the opportunity to do so, then the defense of
22 entrapment fails.

23 Now, the jury is not to consider or in any way
24 to speculate about the punishment which a defendant may
25 receive if found guilty. The function of a jury is to

1 rglm 49

2 determine the guilt or innocence of a defendant on the
3 basis of the evidence and on these instructions. Then it is
4 for the Court alone or the judge who has the duty of determin-
5 ing the sentence if there is a conviction. So you should
6 not discuss possible punishment during the course of your
7 deliberations.

8 Under your oath as jurors, you are not to be
9 swayed by sympathy. You are to be guided solely by the
10 evidence in the case and the crucial hard-core question
11 that you must ask yourselves as you sift through this
12 evidence is: Where do you find the truth? This is a
13 quest for the truth. That is what a trial is. It is not
14 a battle of wits. It is not a contest in salesmanship
15 and it is not a contest in personalities. The only triumph
16 in any case, whether it be civil or criminal, is whether
17 or not the truth has triumphed. If it has, then justice has
18 been done; if not, justice will not have been done. You are
19 to determine the guilt or innocence of each defendant
20 solely on the basis of the evidence and the law as I have
21 given it to you in these instructions.

22 If you have a reasonable doubt as to a defendant's
23 guilt you should not hesitate for any reason to return a
24 verdict of acquittal.

25 As I said, your verdict as to each count must be

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a unanimous verdict and must be returned separately as to each defendant named in that count.

Now, the form of your verdict is either "Guilty" or "Not guilty." You may return a verdict of guilty as to each count in which a defendant is named; you may return a verdict of not guilty as to each count in which a defendant is named; you may return a verdict of guilty as to some counts in which a defendant is named and a verdict of not guilty as to others. If you are not able to agree on a verdict as to a particular count or as to several counts, you may not compromise by finding the defendant guilty as to certain counts but not guilty as to others.

Now the most important part of this case, ladies and gentlemen, is the part which you now are about to play as jurors because it is for you and you alone to decide whether a defendant is guilty or not guilty as to each count. I know you will try the issues that have been presented to you according to the oath which you have taken as jurors. In that oath you promised that you would well and truly try the issues joined in this case and a true verdict render. I suggest to you that if you follow that oath and try the issues without combining your thinking with any emotions, then you will arrive at a true and just

1 rglm 51

2 verdict.

3 Now, it must be clear to you that once you get
4 into an emotional state and let fear or prejudice or bylaws
5 or sympathy interfere with your thinking, then you will
6 not arrive at a true and just verdict and as you deliberate,
7 ladies and gentlemen, please be careful to listen to the
8 opinions of your fellow jurors as well as to ask for an
9 opportunity to express your own views. No one juror
10 holds the center stage in the jury room. No one juror
11 controls or monopolizes the deliberations. If after
12 listening to your fellow-jurors and if after stating your
13 own view you become convinced that your view is wrong, do
14 not hesitate because of stubbornness or pride of opinion
15 to change your view.

16 On the other hand, do not surrender your honest
17 conviction solely because of the opinion of your fellow-
18 jurors or because you are outnumbered. You are instructed
19 that you are not to reveal the standing of the jurors;
20 that is, the split of the vote for any count if that
21 should occur, to anyone, including the Court, at anytime
22 during your deliberations.

23 Now, while you are in the jury room you may
24 send for any exhibit you desire to examine or have any of
25 the testimony you desire read back.

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2 Now, will counsel for each side please approach
3 the bench in the robing room.

4 (In the robing room.)

5 THE COURT: All right, we will start with the
6 Government first. Do you want to put on the record your
7 exceptions to the charge.

8 MR. MAC BETH: I had only one problem, your
9 Honor. In discussing the license needed in Count 2, your
10 Honor went on then to discuss the stipulation and the
11 shotgun and the records in Washington.

12 Now, the shotgun and definition of shotgun only
13 goes to Counts 3 and 4 and that was not relevant to Count
14 2, so that I would only ask in relationship to that, so
15 that the jury is clear, that the license required under
16 Count 2 goes to guns generally and not to shotguns in
17 particular.

18 MR. PRAVADA: I join in that. I noted the
19 same point Mr. Mac Beth has pointed out.

20 THE COURT: You say as to Count 2, the license --

21 MR. MC BATH: The license required --

22 THE COURT: Goes only to Count 2.

23 MR. MAC BETH: The license required under Count
24 2, in other words, to engage in the business of dealing in
25 guns, is a license required for dealing in any kind of gun

1 rglm 53

2 and there is no special requirement as to shotguns.
3 Special requirements as to shotguns and their registration
4 are relevant on two counts: 3 and 4.

5 THE COURT: Would you repeat what you said?

6 MR. MAC BETH: The license required to engage
7 in the business of dealing in guns is a license required
8 to deal in any kind of a gun and the special requirement of
9 registration or shotgun is required only under Counts 3
10 and 4, not the general dealing under Count 2.

11 THE COURT: And I read that as relating to
12 Count 2?

13 MR. MAC BETH: Yes, your Honor.

14 THE COURT: I see it in connection with my
15 discussion of the second count, that there has been a stip-
16 ulation in this case that defendants have not procured
17 a license. Now, you are indicating that I repeated that
18 with respect to Counts 3 and 4?

19 MR. MAC BETH: No, in relation to Count 2, your
20 Honor made specific reference to the shotgun and to the
21 records in Washington.

22 THE COURT: Let me look at that again. I don't
23 understand what the problem is. Oh, yes, I see it in the
24 end here. Wait a minute, now. The specific reference to
25 a shotgun had to do with the fact that these -- the

1 rglm 54

2 stipulation was not proof that it was a shotgun or a fire-
3 arm and I see you say I mentioned shotgun there?

4 MR. MAC BETH: Those certifications, Exhibits 6,
5 7 and 8 are relevant only to Counts 3 and 4 and because
6 those are for the particular registration needed for the
7 shotgun under Counts 3 and 4 and the reference was here
8 directly in the discussion of Count 2, so what I wanted
9 clarified was the particular finding as to its being a
10 shotgun and as indicated by Exhibits 6, 7 and 8 was
11 relevant only to Counts 3 and 4 and not to Count 2.

12 THE COURT: What was the number of the stipulation
13 to the effect that none of the defendants had secured a
14 license?

15 MR. MAC BETH: I could find that out by going
16 out to the courtroom. It is Exhibit -- may I get it from
17 the courtroom, your Honor?

18 THE COURT: Yes, and then bring 6, 7 and 8.

19 MR. MAC BETH: I will.

20 Government's 9 is the stipulation as to the
21 license.

22 THE COURT: That 9 had secured a license and
23 that relates to Count 2, and then 6, 7 and 8 relate to
24 Counts 3 and 4, and what does that say and these are what?

25 MR. MAC BETH: These are certifications that the

1 rglm 55

2 named defendant has not registered the shotgun in the
3 national registry.

4 THE COURT: All right. So you want it clarified
5 to indicate that the registration requirement applies only
6 to Counts 3 and 4, is that it?

7 MR. MAC BETH: Yes. Those exhibits and the
8 issue of the shotgun only relate to Counts 3 and 4.

9 The Government has no other exception.

10 THE COURT: Mr. Seffern?

11 MR. SEFFERN: I have no exception, your Honor.

12 THE COURT: Mr. Lipson?

13 MR. LIPSON: Your Honor, I object to your Honor's
14 statement concerning the special danger that conspiracies
15 pose. I also object to your failure in describing "aiding
16 and abetting" to specify that the aider and abettor must
17 have the same criminal intent as a principal is required
18 to have. Also, I don't think your Honor made clear with
19 respect to the conspiracy that an individual's participation
20 in a conspiracy must be with a specific intent to engage
21 in the business of dealing in firearms and I also don't
22 think your Honor made it clear that the question of an
23 individual's membership in a conspiracy is determined by
24 his own acts and words rather than that of any other alleged
25 co-conspirator.

I also would submit that your Honor's in effect Pinkerton charge with respect to the liability of a conspirator for acts of co-conspirators, was overly broad in that it didn't sufficiently limit the liability to those acts which one could have reasonably contemplated would be engaged in as part of the conspiracy.

THE COURT: I didn't give any Pinkerton charge.

MR. LIPSON: You didn't give a Pinkerton charge with respect to responsibility for other counts, but you did say that the individuals were responsible for other acts of co-conspirators and I thought it wasn't clear.

THE COURT: It was a partnership analogy, but I didn't give any Pinkerton charge.

MR. LIPSON: Otherwise I would just merely note that insofar as your Honor's charge did not accord with the previously submitted requests for the defendant Fondseur, I would like to have an exception.

THE COURT: All right, do you have any exceptions?

MR. CANTOR: Yes.

THE COURT: Put yours on the record.

MR. CANTOR: Judge, I take exception to your conspiracy charge insofar as it did not clearly indicate to the jury that they must find, at least at the prima facie level, for the acts and declarations of an individual

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defendant, that he himself entered into that conspiracy before the acts and declarations in furtherance of the conspiracy and during the pendency of the conspiracy, but the co-conspirators are binding upon that defendant.

I so except to that particular point and I request your Honor to charge that which I have just mentioned.

THE COURT: Read that back.

(Record read.)

THE COURT: Do you have another exception?

MR. CANTOR: Yes, if your Honor please. I except to your charge with respect to your general discussion as to the underpinnings of a verdict. Twice you said at the beginning of your charge, Judge, that a verdict must be based solely on the evidence adduced in the case and your Honor failed to indicate that a verdict can be based either on the evidence or the lack of evidence. Albeit you did on one occasion subsequent to that, Judge, indicate not with respect to a verdict generically, but with guilt or innocence, that it can be based on evidence or lack of evidence and at the end of your charge, at the very end of your charge you indicated that guilt or innocence must be based on the evidence and the law and again I except to that portion which failed to note that the determination of guilt or innocence can be predicated

1 rglm 58

2 upon the absence of evidence as well. I so except to
3 that and request you to charge along the lines I have
4 indicated.

5 Do you want me to go seriatim?

6 THE COURT: Yes. That's what I am waiting for.
7 I am not going to answer your each point, just put your
8 exceptions on the record.

9 MR. CANTOR: I take exception to your Honor's
10 charge with respect to your comments on Michael Soto and
11 request that your Honor charge that with respect to the
12 testimony of the confidential Treasury Department informant,
13 Michael Soto; that he is, as a matter of law, an interested
14 witness; that he is being paid by the Government and
15 thus has an interest in the success of the prosecution
16 which can lead to future assignments or further payments
17 of money.

18 I also except to that portion of your Honor's
19 charge dealing with the burden imposed upon the people
20 of guilt beyond a reasonable doubt and I request your
21 Honor to charge that the burden of guilt beyond a reasonable
22 doubt is a heavy and substantial burden that rests upon
23 the shoulders of the Government.

24 I further except to your Honor's charge with
25 respect to that portion that touched upon conspiracy.

1 rglm 59

2 Your Honor said that one of the charges embraced in the
3 information is conspiracy to violate the federal gun control
4 laws and in effect the only conspiracy charged by the
5 Government is to violate but one section of Title 18,
6 part of which title deals with federal gun control laws.

7 Next, if your Honor please, I most strongly and
8 vigorously take exception to your Honor's charge with respect
9 to circumstantial evidence. Your Honor had occasion
10 during the course of the charge to mention circumstantial
11 evidence by name and also indirectly, by making reference
12 to inferences that could be drawn by this jury.

13 I note the absence in your Honor's charge
14 with respect to circumstantial evidence, there was no
15 instruction to the jury that the inference to be drawn
16 which must flow, must flow naturally and directly and
17 from the facts which have been adduced in order to make
18 out certain proven facts, and that this inference must
19 exclude to a moral certainty beyond a reasonable doubt
20 every hypothesis but that of a guilty hypothesis.

21 THE COURT: The Second Circuit expressly ruled
22 that out in the United States against Taylor.

23 Would you please hurry so we can get back to
24 the jury?

25 MR. CANTOR: Judge, I am trying.

1 rqlm 60

2 I also take exception to and join my brother,
3 Mr. Lipson, with respect to your Honor's charge on con-
4 spiracy; that it poses a greater potential for crime than
5 the lone wrongdoer and I submit that is a prejudicial inter-
6 jection of a matter into the ambit of a charge.

7 I also, if your Honor please, take exception to
8 your Honor's charge on conspiracy, that your Honor said
9 that the acts and declarations of a co-conspirator are
10 of course binding upon an individual, any member of that
11 conspiracy, as long as they are made in furtherance of
12 the conspiracy and during the pendency of the conspiracy
13 according to the dates charged in the information. I don't
14 have the information in front of me, but if my recollection
15 serves, the information said the operative dates are April
16 9th up until the filing which is April 11, 1976.

17 I submit, if your Honor please, that this con-
18 spiracy ended on August 20, 1975 by virtue of the arrest
19 of everyone involved here and I would request your Honor
20 to charge that aside from any question of the existence
21 of the conspiracy the only possible duration of this
22 conspiracy, it had to be brought to a close on August
23 20, 1975 by virtue of the arrest of these individuals.

24 I further take exception with respect to your
25 Honor's charge on the conspiracy point. Your Honor

1 rgin.
2 indicated at a subsequent point that a conspiracy can end
3 when an objective is fulfilled. I therefore would submit
4 and request your Honor to charge that aside from any ques-
5 tion of the existence of a conspiracy, that this conspiracy
6 therefore must have ended on May 3, 1975, which is the
7 last objective, at least according to the Government's
8 proof if it be credited that anything went on by way
9 of the sale of guns.

10 That constitutes my exceptions, your Honor.

11 THE COURT: Do you have any, Mr. Pravda?

12 MR. PRAVDA: I do. They will be more brief,
13 your Honor.

14 I will join in that exception that was posed
15 by Mr. Lipson in regard to the conspiracy matter and with
16 regard to the statement that a conspiracy poses a greater
17 threat than the lone wrongdoer.

18 I would also except and request the Court to
19 charge that the jury may only consider statements of co-
20 conspirators against any other co-conspirator only after
21 they have, one, found the conspiracy to exist; and, two,
22 found that particular person against whom they wished to
23 use the statements to be a member of the conspiracy.

24 THE COURT: The Second Circuit has expressly
25 ruled that out years ago.

1 rglm 62

2 MR. PRAVDA: I would also request, your Honor,
3 since you did read two different definitions of firearm,
4 that you make clear that one of the definitions, the Title
5 13 definition, refers only to Counts 1 and 2, whereas the
6 Title 26, the definition is to be utilized only with
7 respect to Counts 3 and 4. I join, as I indicated, in Mr.
8 Mac Both's exception with regard to the license, that is
9 Exhibits 6, 7, and 8, and its reference and applica-
10 bility only to Counts 3 and 4 and not to 2; and lastly, I
11 would except, your Honor, according to my count there were
12 seven instances during the charge where you used the ex-
13 pression in one variant or another determination of guilt
14 or innocence and I submit that the juxtaposition of guilt
15 or innocence may give rise to an error in the jury's mind
16 that they must feel that a defendant is innocent rather
17 than simply not guilty before they can return a verdict of
18 not guilty.

19 THE COURT: All right, let's return to the
20 courtroom.

21 (In open court.)

22 THE COURT: Ladies and gentlemen, there is one
23 part of the charge which I would like to clarify and that
24 is my reference to certain certificates which were offered
25 in evidence by the Government and marked as Government's

1 rglm 63

2 Exhibits 6, 7 and 8. Now, those exhibits are certificates
3 from Washington to the effect that the shotgun which the
4 Government claims is a shotgun here was not registered
5 by any of the defendants as required. These three certi-
6 ficates relate only to Counts 3 and 4, which are counts
7 with respect to the shotgun. Now, there was another
8 stipulation, Government's Exhibit 9, to the effect that
9 none of the defendants had a license to engage in the
10 business of firearms and of course that relates to any
11 firearm sale.

12 Now, at this time, I think we will have to
13 excuse the alternate juror and after that, the jurors will
14 retire to the jury room.

15 (Alternate juror excused.)

16 THE COURT: Would you please swear the marshals,
17 Mr. Clark.

18 (One marshal was duly sworn.)

19 THE COURT: All right, the jurors may follow the
20 marshal to the jury room. Everyone remain seated until
21 the jurors have left.

22 (At 6:50 p.m., the jury retired to the jury
23 room to deliberate upon a verdict.)

24 THE COURT: All right, at this time the jurors
25 are going to dinner, so that everyone may adjourn also for

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dinner until 8:15, approximately.

MR. PRAVDA: May I inquire, your Honor, to determine what restaurant the jurors are being taken to?

THE COURT: Aldo's.

You will know not to go there, gentlemen.

MR. PRAVDA: That's the reason I inquired.

(Recess.)

(At 8:15 p.m., a note was received from the jury.)

(In open court; jury not present.)

THE COURT: Gentlemen, when the jurors came back from dinner they asked the marshal if they can have a blackboard which was sent in to them and now we have a note which will be marked Court's Exhibit A, which reads as follows:

"We request copies of the definitions of terms used in the charges plus copies of the various counts leveled at each defendant."

I think you indicated earlier, or the clerk did, that there was a clean copy of the information. We will have to bring the jurors in to clarify --

MR. MAC BETH: I have had a --

THE COURT: Please don't interrupt when the Court is talking. The reporter can't get it.

1 rglm 65

2 We will have to bring in the jurors to have them
3 clarify what is meant by "definition of terms used in
4 charges." I have no idea what that would mean.

5 Does anybody want to be heard on it?

6 MR. CANTOR: I assume, Judge, that you read
7 various definitions that appear in statutory language and
8 the statutory framework concerning engaging in the
9 business of dealing in firearms. It seems to me to be an
10 omnibus type of request. Maybe it can be honed out.

11 THE COURT: Yes, we will bring them in and ask
12 them to be more specific.

13 What did you say about the indictment?

14 MR. MAC BETH: I have had a copy of the form
15 retyped without the a/k/a in it. I believe there was an
16 agreement that will be redacted.

17 THE COURT: Yes.

18 Has the defense counsel seen the clear copy,
19 the redacted type?

20 Gentlemen, I am going to mark the note Court's
21 Exhibit 1 instead of A.

xxx

22 (Note from jury marked Court Exhibit 1.)

23 THE COURT: We will bring in the jurors and
24 hand them that copy of the information and ask them to
25 clarify the notes.

1 rglm 66

2 (In open court; jury present at 3:49 p.m.)

3 THE COURT: Ladies and gentlemen of the jury,
4 I have your note which has been marked Court's Exhibit 1,
5 which reads as follows:

6 "We request copies of the definitions of terms
7 used in the charges plus copies of the various counts
8 leveled at each defendant."

9 Now, with respect to the second request, we
10 have a copy of the information which the court clerk may
11 hand to the forelady of the jury.

12 Now, it isn't clear to me what you mean by
13 "copies of definitions." I assume that you mean definitions
14 which I read to you, statutory definitions and others,
15 during the course of the charge. I don't have copies
16 to furnish. I would have to reread those, so if you want
17 to be more specific in your note, it would be helpful to
18 go into the jury room and write another note being more
19 specific as to what you mean by "copies of definitions of
20 terms used in the charges," because there were terms used
21 in the statute which I defined for you and then there was
22 the term "engaging in the business of dealing in firearms"
23 which is the only -- well, it is one of the definitions
24 that is not in the statute, but it is in the charge, so
25 if you could clarify that for us it would be helpful.

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All right, you may return to the jury room.

(The jury returned to the jury room.)

(At 9:03 p.m., a note was received from the jury.)

THE COURT: Gentlemen, we have another note from the jurors which will be marked Court's Exhibit 2, which reads as follows:

"We require statutory definition: 1. Entrapment."

Of course there is no statutory definition. I will have to reread the entrapment charge, I guess. Agreed?

MR. SEFFERN: Yes, your Honor.

MR. CANTOR: That's the extent of the request?

THE COURT: Yes.

Does anybody want to see the note?

(Note from jury marked Court Exhibit 2.)

THE COURT: Then, gentlemen, there being no disagreement, I will read the entrapment charge.

(Jury present.)

THE COURT: Ladies and gentlemen, I have your next note which has been marked Court's Exhibit 2, which reads as follows:

"We require statutory definition: 1. Entrapment."

Now, it is not a statutory definition, but a legal definition abstracted from the cases, so I will reread

the charge to you that I read before on the law of entrapment, which as I told you, is a legal concept.

The defendant Louis Soto asserts as a defense to the charges made against him in the information that he was the victim of entrapment by an agent of the Government.

The word "entrapment" that I have just used is a legal term. It has a technical meaning, not that of popular speech. Therefore, I must explain the word and meaning of entrapment as it is used in the law.

Criminal activity is such that sometimes stealth and strategy are necessary methods to be used by law-enforcement officers. The function of law enforcement is not only the prevention of crime, but also the detection and apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. The defense of entrapment is based upon the policy of the law, not to ensnare or entrap innocent persons into the commission of a crime, but a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal.

A basic feature of entrapment is that the idea or design of committing the crime originated with a law-enforcement officer or a paid Government informer rather than with a defendant. Another feature of entrapment is that the defendant had no previous disposition, intent or

1 rglm 69

2 purpose to commit the alleged offense. Another feature
3 of entrapment is that the law-enforcement officer, or
4 Government employee, implanted in the mind of an innocent
5 person the disposition to commit the alleged offense and
6 instigated its commission in order that the defendant might
7 be arrested and prosecuted.

8 If you find that an agent or employee of the
9 Government merely afforded a favorable opportunity to the
10 defendant for the commission of the alleged crime, such
11 conduct on the part of the Government does not constitute
12 entrapment. Entrapment would occur only if you find that
13 the Government agent induced the defendant to commit the
14 crime charged in the indictment and that the criminal
15 conduct of the defendant was the product of the Government's
16 activity. If the jury finds any credible evidence creating
17 the reasonable possibility that a Government agent or
18 employee instigated and incited or otherwise induced the
19 defendant to commit the crime charged, then the Government
20 must prove beyond a reasonable doubt that such inducement
21 was not the cause or creator of the crime. That is, the
22 Government must prove that the defendant had been predis-
23 posed and willing to commit the crime.

24 In other words, expressing the same thought,
25 while a defendant is not required to prove his entrapment

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beyond a reasonable doubt, the Government must prove its absence beyond a reasonable doubt and if you have a reasonable doubt as to the absence of entrapment and find a reasonable possibility of entrapment you must acquit the defendant.

If the prosecution has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offense charged and was merely awaiting a favorable opportunity to commit the offense, then you may find that the inducement, if any, which brought about the actual offense was no more than the providing of what appeared to the defendant to be a favorable or timely or convenient opening for the criminal activity in which that defendant engaged. In such circumstances you may find that the Government's agent has not **seduced** an innocent person, but has only provided the means for the defendant to effectuate or realize his own then existing purpose.

The central issue is whether the defendant's activities in connection with the firearms charge contained in this indictment, were caused by the urging and inducing of the Government agents or whether the agents simply afforded him the opportunity to commit the crime. If you find that the defendant was induced to commit the crime charged by the acts and conduct of the Government

agents, then the defendant should be acquitted. On the other hand, if the Government has proved beyond a reasonable doubt that he was ready and willing to commit the crime, and was simply afforded the opportunity to do so, then the defense of entrapment fails.

All right, that's the extent of the Court's charge on entrapment. You may return to the jury room.

(At 9:10 p.m., the jury again retired to continue their deliberations.)

THE COURT: Gentlemen, I have drawn up a form of verdict to help the jury with recording its verdict.

I gather they sent for the blackboard so that they can have some means of recording the vote on the various counts with respect to the various defendants, so that should be down shortly.

I have used each defendant in the order in which they appear in the indictment and made appropriate boxes for "Guilty" or "Not guilty" next to each charge and you can look at that and I think if we send that in, that will help them to be able to record the verdict in an orderly fashion.

MR. CANTOR: Is it here in the courtroom, Judge, the verdict sheet?

THE COURT: No, I am having it typed up. It

1 rglm 72

2 will be ready in a few minutes, so don't leave the floor.

3 Be right outside the door.

4 (Recess.)

5 (In open court.)

6 THE COURT: Gentlemen, as I indicated, I have
7 made up a form of verdict for the jurors to record their
8 verdict on and I will ask the clerk to pass you a copy of it.
9 I will ask the clerk to give the original to the marshal
10 so he can hand it to the foreman of the jury.

11 MR. CANTOR: I consent for purposes of the
12 record, Judge.

13 MR. MAC BETH: The Government has no objection.

14 MR. PRAVDA: I consent as well.

15 MR. CANTOR: Do we keep these, Judge?

16 THE COURT: Yes.

17 All right, we will take a brief recess.

18 (Recess.)

19 (At 9:50 p.m., a note was received from the
20 jury.)

21 (In open court; jury not present.)

22 THE COURT: We will wait until the marshal brings
23 up Mr. Rodriguez.

24 (Pause.)

25 THE COURT: Gentlemen, we have a note from the

1 rglm 73

2 jurors which reads as follows:

3 "Legal definition of 'business of dealing in
4 firearms and ammunition' as defined by Judge Motley."

5 This will be marked Court's Exhibit 3.

6 (Note from jury marked Court Exhibit 3.)

7 THE COURT: Bring in the jurors, please.

8 (Jury present at 10:00 p.m.)

9 THE COURT: Ladies and gentlemen, I have your
10 latest note, which will be marked Court's Exhibit 3 and
11 which reads as follows:

12 "Legal definition of 'business of dealing in
13 firearms and ammunition' as defined by Judge Motley."

14 That has been marked Court's Exhibit 3.

15 I will repeat that definition now:

16 I charge you that the statutes in question do
17 not set forth specifically a definition of the words of
18 "engaging in the business of dealing in firearms." There-
19 fore, you are to apply your common sense and general
20 experience in determining whether or not the defendants
21 engaged in the business of dealing in firearms.

22 I charge you further that there are certain well
23 established characteristics of engaging in business which
24 you must apply in reaching your verdict:

25 Business is that which occupies the time, attention

1 rgin 74

2 and labor of man for the purpose of a livelihood or profit.
3 To engage in business implies an element of continuity or
4 habitual practice. One who is engaged in the business of
5 dealing in firearms must have guns on hand or be ready
6 and able to procure them and sell them to such persons
7 as might accept them as customers.

8 I charge you further on this subject that
9 engaging in business does not mean the performance of a
10 single disconnected business act, nor does it mean one or
11 more isolated transactions. If you do not find that the
12 defendants were engaged in the business of dealing in fire-
13 arms, then whether or not it has been shown that they sold
14 one or more firearms, I charge you that you must acquit
15 the defendants. An isolated sale in one's home does not
16 place an individual in the business of dealing in firearms,
17 in the absence of other characteristics indicative of such
18 business as I have just described.

19 All right, that was the end of the definition
20 of the terms "engaging in the business of dealing in fire-
21 arms."

22 All right, you may return to the jury room.

23 (At 10:03 p.m., the jury again retired to
24 continue their deliberations.)

25 THE COURT: Mr. Marshal, will you please keep

1 rglm 75

2 the defendant up here because we don't know when the
3 jurors will bring out another note.

4 (Recess.)

5 (At 10:25 p.m., in open court; jury not present.)

6 THE COURT: Gentleman, since most of the jurors
7 are women, I arranged for buses to take them home at 10:30.
8 We are going to recess now until 9:30 tomorrow morning.

9 Bring the jury in, please.

10 (At 10:25 p.m., jury present.)

11 THE COURT: Ladies and gentlemen, we have
12 arranged to have buses take you home at 10:30, so we
13 are going to recess now until 9:30 tomorrow morning.

14 I want to caution you about discussing the case
15 outside the jury room. Please do not discuss the case
16 with anyone for any reason outside the jury room.

17 All right, you are excused now until 9:30
18 tomorrow morning.

19 (At 10:26 p.m., the jury was excused.)

20 (Adjourned to 9:30 a.m., February 27, 1976.)

21

22

23

24

25

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UNITED STATES OF AMERICA

vs.

76 Cr. 144

LOUIS SOTO, RICARDO FONDEUR,
JOSE DELVAS, DAVID RODRIGUEZ

February 27, 1976
9:30 a.m.

Trial resumed.)

(In open court; jury not present.)

(At 11:15 a.m., two notes were received from
the jury.)

THE COURT: Gentlemen, we have two notes from
the jurors.

The first one is marked Court's Exhibit 4 and
reads as follows:

"May we hear Chino's testimony on what
occurred April 4th.

"May we have Michael Soto's testimony on what
occurred April 9th, the day the shotgun was sold in the
five-floor apartment."

THE COURT: Now, the second note, which will
be marked Court's Exhibit 5, read as follows:

"We would like to hear again the definition of
conspiracy and possession as given by the Judge in her
charges to the jury."

1
2 THE COURT: I have asked the reporter to find
3 the portions of the testimony that the jurors want read
4 back.

5 I believe the reporter has found all of the
6 testimony requested by the jury, so we will bring in the
7 jury now and have him read that testimony to them.

8 With respect to the second note, there is some-
9 thing of a problem in that they asked for the definition
10 of conspiracy, as given in the charge. I am assuming
11 that that means they want the conspiracy charge itself
12 reread, but I will ask them about that when they are in
13 here, to clarify it. It is not clear whether they are
14 asking for the charge on conspiracy or just a definition
15 of conspiracy.

16 All right, bring them in.

17 (Jury present.)

18 THE COURT: Ladies and gentlemen, we have your
19 first note which reads as follows:

20 "May we hear Chino's testimony on
21 what occurred April 4th. May we have Michael Soto's
22 testimony on what occurred April 9th, the day the shotgun
23 was sold in the five-floor apartment."

24 Now, the reporter has gone through his notes and
25 has found that testimony and he will now reread it to you.

(Record read.)

THE COURT: Ladies and gentlemen, with respect to your next note, which is marked Court's Exhibit 5, it reads as follows:

"We would like to hear again the definition of conspiracy and possession as given by the Judge in her charges to the jury."

Now, with respect to the first request -- that is, the definition of conspiracy -- I defined conspiracy as a part of the entire charge on conspiracy.

Now, would you clarify it for me, Madam Foreman? Is that the definition of conspiracy or the entire charge on conspiracy?

THE FORELADY: No, the definition, as used in the charge.

THE COURT: The definition of conspiracy as used in the conspiracy charge?

THE FORELADY: Right.

THE COURT: All right, I believe that before proceeding to the elements of the crime of conspiracy I did give you a definition of that term in the very first sentence, which reads as follows:

"A conspiracy is a collective criminal agreement, a partnership in crime."

1 rglm 79

2 Then I went to explain why the Congress had made
3 conspiracy to violate a federal statute a separate and
4 distinct crime from any substantive crime which may be
5 committed in the course of the conspiracy.

6 Now, the next definition that you wanted was
7 the definition of possession, and that reads as follows:

8 "The word 'possessed' has its everyday common
9 meaning. That is, to have something within one's control,
10 either physically or constructively. Physical custody
11 obviously meets this requirement. To possess a gun also
12 means to have dominion and control of the gun, such that
13 the defendant could claim or move the gun himself or cause
14 others to move it as his agents. In short, it is not
15 necessary for the Government to prove that the defendant
16 has actual physical possession of the gun. Proof of
17 constructive possession is sufficient.

18 "The law recognizes also that possession may be
19 joint or sole. If one person alone has actual or con-
20 structive possession of a thing, possession is sole. If
21 two or more persons share actual or constructive possession
22 of a thing, possession is joint."

23 If you find from the evidence beyond a reasonable
24 doubt that a defendant either alone or jointly with others
25 had actual or constructive possession of the sawed-off

1 rglm 30

2 shotgun then you may find that the gun was in the possession
3 of the defendant within the meaning of the words as used
4 in these instructions.

5 Now, I have your further note, which will be
6 marked Court's Exhibit 6, and which reads as follows:

7 "We would like to see the documents:

8 "1. Title 18, United States Code, Section
9 922(a)(1) and Section 2.

10 "2. Title 18, Section 371.

11 "3. Title 26, United States Code, Section
12 5861(d) and (e); and Title 18, United States Code, Section
13 2."

14 THE COURT: Now, each of those is a federal
15 statute and I read portions of those statutes to you during
16 the course of the charge, so what I will do now is to reread
17 those portions of the statute which I read earlier to you.

18 The first is Title 18, United States Code,
19 Section 922(a)(1), and that read as follows:

20 "It shall be unlawful for any person except
21 a licensed importer, licensed manufacturer or licensed
22 dealer, to engage in the business of importing, manufactur-
23 ing or dealing in firearms or ammunition."

24 Now, the next is Title 18, United States Code,
25 Section 2, which is the aiding and abetting statute, and

rglm 81

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that reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

The next is Title 18, United States Code, Section 371, the conspiracy statute, and that reads in pertinent part as follows:

"If two or more persons conspire either to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of a crime."

Now, the next is Title 26, United States Code, Section 5861(d) and (e).

Now, Title 26, United States Code, Section 5861(d) reads as follows:

"The term 'shotgun' means a weapon designed or re-designed, made or remade and intended to be fired from the shoulder and designed or re-designed and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles, ball shot, or a single projectile for each pull of the trigger and shall include any such weapon which may be readily restored to fire a fixed shotgun shell."

MR. MAC BETH: Excuse me, your Honor, I believe that you read 5845(d) rather than 5861(d).

THE COURT: I'm sorry; yes, that's true.

Yes, I did read the wrong statute.

This is 5861(d). It reads as follows:

"It shall be unlawful for any person to possess a firearm which is not registered to him in the National Firearms Registration Record."

(e) reads:

"It shall be unlawful for any person to transfer a firearm in violation of the provisions of this chapter."

All right, you may return to the jury room.

THE FORELADY: We still have a question regarding the conspiracy.

When you first charged us, you read us a longer --

THE COURT: That's why I wanted you to clarify it. You wanted the entire charge on conspiracy?

THE FORELADY: I think so.

THE COURT: Would you mark these, Mr. Clerk.

(Notes from jury marked Court Exhibits 4, 5

and 6.)

THE COURT: All right, continuing with reading the entire charge on conspiracy:

"A conspiracy is a collective criminal agreement,

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a partnership in crime. A conspiracy presents a greater potential threat to Government and society than acts committed by a lone wrongdoer. That is why the Congress has made conspiracy to violate a federal statute a separate crime, separated and distinct from any substantive crime which may be the objective of the conspiracy. Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish.

"Moreover, group association increases the likelihood that the criminal objective will be successfully realized and renders detection more difficult than in the instance of the lone wrongdoer.

"It is because of these and other reasons that the Congress has made conspiracy or concerted action to violate a federal law a separate and entirely distinct and different crime from the substantive law which may be the object of the conspiracy.

"Now, in order to prove the crime of conspiracy the Government must establish to your satisfaction beyond a reasonable doubt each of the following essential elements of the crime of conspiracy:

"First, the existence of the conspiracy as alleged in the indictment.

"Second; that it was a purpose of the conspiracy to violate Title 18, United States Code, Section 922.

"Third; that the defendant knowingly and willfully became a participant in, that is a member of the conspiracy.

"Fourth; that at least one of the co-conspirators knowingly committed at least one of the overt acts set forth in the indictment in furtherance of the conspiracy and during the period of the conspiracy alleged in the information.

"Now I want to discuss the first element, that is the existence of the conspiracy in greater detail.

"To establish a conspiracy, the Government is not required to show that two or more persons sat around a table and entered into a solemn compact either orally or in writing, setting forth that they have formed a conspiracy to violate the law, setting forth details of the plan, the means by which the unlawful project is to be carried out or the part to be played by each co-conspirator. Indeed, it would be extraordinary if there were such a formal agreement or specific oral statement. Your common sense will tell you that when men in fact undertake to enter into a criminal conspiracy much is left to unexpressed understanding.

"Conspirators do not usually reduce their agreements

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to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans. From its very nature a conspiracy is almost invariably secret in its origin and execution. Therefore, it is sufficient if two or more persons in any manner through any contrivance, impliedly or tacitly, come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy, nor is it required to find that all the co-conspirators alleged in the information joined in the conspiracy in order to find that a conspiracy existed. You need only find that one of the defendants entered into an unlawful agreement with one or more persons in order to find that a conspiracy existed.

"In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators which are done to carry out an apparent criminal purpose. The adage "Actions speak louder than words" is applicable here. Usually the only evidence available of a conspiracy is that of disconnected acts which, however, when taken together in connection with each other, show a conspiracy to secure a particular result as satisfactorily and conclusively as more direct proof. Proof concerning the accomplishment of the objective of a

rglm 36

conspiracy may be the most persuasive evidence of the existence of the conspiracy itself.

"Success of the venture, if you believe it was successful, may be the best proof of the existence of the agreement. In this connection it is not necessary for the Government to prove the success of the conspiracy in order to establish a violation of the conspiracy statute. As a conspiracy is basically the agreement to violate the law, it may exist even though the final objectives were never realized.

"In determining whether the conspiracy charged in the information actually existed, you may consider the evidence of the acts and the conduct of the alleged co-conspirators as a whole and the reasonable inferences to be drawn from such evidence. If upon such consideration of the evidence you find beyond a reasonable doubt that the minds of at least two of the alleged co-conspirators met in an understanding way and that they agreed, as I have explained the conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the information, then proof of the existence of the conspiracy, but only of its existence, is complete.

"While the information charges that the conspiracy began on or about April 9, 1975 and continued to on or about

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April 9, 1975 and continued to on or about February 11, 1976, it is not essential that the Government prove that the conspiracy started and ended on or about those specific dates. It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial time within the period set forth in the information and that at least one of the overt acts was committed in furtherance of the conspiracy during that period.

"An overt act which you find did occur need not have occurred on the specific dates set forth in the indictment. You need only find that it occurred no earlier than April 9, 1975 and no later than February 11, 1976.

"Now we come to the second element. The indictment charges that the conspiracy had as an objective, the violation of Title 18, United States Code, Section 922(a)(1). Now, the Government must prove this second element of the crime, that is, it must prove that it was a purpose of the conspiracy to violate that statute.

"Now, we come to the third element. The third element which you must find is that the defendant knowingly and willfully became a member of the conspiracy. A defendant's participation in the conspiracy, like its existence, can be inferred from such facts and circumstances in evidence as would logically sustain that inference. I

1 rglm 88

2 want to caution you, however, that mere association of one
3 defendant with an alleged conspirator or conspirators does
4 not establish his participation in the conspiracy if you
5 find that one did exist. So, too, mere knowledge by a
6 defendant of the conspiracy or any illegal act on the part
7 of an alleged co-conspirator is not sufficient evidence to
8 establish his membership in the conspiracy. You must find
9 actual knowing participation by the defendant in the agree-
10 ment to violate the law. An act is done knowingly, if it
11 is done voluntarily and purposefully and not because of
12 mistake, accident, mere neglect or other innocent reason.

13 "An act is done willfully if it is done knowingly,
14 deliberately and with an evil motive or purpose. In
15 determining whether a defendant has acted willfully it is
16 not necessary for the Government to establish that the
17 defendant knew that he was breaking any particular law or
18 any particular rule. It must, however, prove that defendant
19 had an evil motive or a bad purpose in mind.

20 "Knowledge and willfulness and intent of a
21 defendant, as I said before, need not be proved by direct
22 evidence. Like any other fact in issue it may be established
23 by circumstantial evidence.

24 Even if one conspirator joined the conspiracy
25 after it was formed and engaged in it to a degree more

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limited than that of other co-conspirators, he is equally culpable so long as he was a co-conspirator. In other words, it is not required that the person be a member of the conspiracy from its very start. He may join it at any point during its progress and be held responsible for all that has been said or done in furtherance of the conspiracy or said and done thereafter and during the existence of the conspiracy and in furtherance thereof and while he remains a member.

Simply stated, and using the partnership analogy, by becoming a partner he assumes all the liabilities of the partnership including those which occurred before he became a member. It is not required that the Government show that a conspirator knew all of the members of the conspiracy. A conspiracy once formed is presumed to have continued until its objective was accomplished or there is some affirmative act of termination by its members.

Once you are satisfied beyond a reasonable doubt that a conspiracy as alleged existed and that the defendant was a member of it, any acts and declarations of any person whom you find was also a member of the conspiracy made during its pendency and in furtherance of its objectives are considered the acts and declarations of all other members, even though the particular defendant was not

1 rglm 90

2 present at the time or did not know such statements were
3 made or such acts were done by others in furtherance of the
4 conspiracy.

5 "In other words, every co-conspirator is fully
6 responsible for what every other co-conspirator does in
7 furtherance of the conspiracy, whether he knows about it or
8 not and whether he specifically approves of it or not.

9 "Now we come to the fourth element of the crime
10 of conspiracy. The offense of conspiracy is complete only
11 when the unlawful agreement is made and any single overt
12 act to effect the object of the conspiracy is thereafter
13 committed by at least one of the co-conspirators. An overt
14 act is any step, action or conduct which is taken to
15 achieve, accomplish or further the objective of the
16 conspiracy. The purpose of requiring proof of an overt
17 act is that while parties might conspire and agree to do
18 an unlawful thing, they may change their minds or even
19 abandon the project and do nothing to carry it into effect,
20 in which event it would not be an offense.

21 "The prosecution is not required to set forth
22 in the indictment each and every act on which it relies
23 to establish the conspiracy or the defendant's participation
24 therein, nor is it required to prove each overt act which
25 may have occurred during and in furtherance of the conspiracy,

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but it is required to prove that at least one overt act did take place in the Southern District of New York, which includes The Bronx.

"The overt act need not be criminal in itself. The overt act, however, must be an act which follows or tends toward the accomplishment of the plan or scheme charged in the conspiracy count and must be knowingly done in furtherance of some objective of the conspiracy charge.

"If you find that the Government has failed to establish beyond a reasonable doubt any one of the four elements of the crime of conspiracy as I have just enumerated and discussed them for you, then you must find the defendant not guilty of the charge of conspiracy. On the other hand, if you should find that the Government has sustained its burden of proving each and every one of the four elements of the crime of conspiracy as I have just enumerated and discussed for you as to a particular defendant beyond a reasonable doubt, then you may convict that defendant on the conspiracy count."

That is the end of the charge on conspiracy.

All right, you may return to the jury room.

(At 12:38 p.m., the jury again retired to continue their deliberations.)

MR. CANTOR: Judge, I wonder, just for purposes

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of preserving this record, I would like to indicate that your Honor, of course, granted all counsel opportunity yesterday after the charge was read in whole, to register any exceptions, if your Honor please, and it was approximately in the area of 6:30 or 7:00 o'clock at night. I must admit in full candor, Judge, that my alacrity at that hour was not what it should be. I would just like for purposes of the record to add certain additional comments and exceptions concerning your conspiracy charge.

THE COURT: All right, we will take it if it doesn't take too long.

MR. CANTOR: No, it will take a minute, Judge.

THE COURT: All right.

MR. CANTOR: If your Honor pleases, I submit that the only obligation upon the Court with respect to charging a jury is one to charge them as to the operative rules of evidence and their obligation to follow it and in effect what your Honor has done is give vent to legislative history. by Congress in promulgating the conspiracy laws and I would submit, if your Honor please --

THE COURT: The Second Circuit has already ruled on that. That's been challenged in the Second Circuit already and it was a charge made by Judge Weinfeld.

MR. CANTOR: If the matter ever goes beyond the

1 rglm 93

2 Second Circuit, I would just like to preserve it on the
3 record now.

4 THE COURT: All right.

5 MR. CANTOR: Thank you, Judge, and that is that
6 the legislative history that your Honor has voiced to
7 this particular jury is prejudicial to my client, Mr.
8 Delvas, in view of the fact that the Court has informed
9 them as to the potentialities of greater harm in dealing
10 with conspiracies to the public and with group association
11 the likelihood of the deeds every being detected by any
12 individual.

13 Secondly, Judge I would object and except to your
14 Honor's charge with respect to that portion that said
15 that proof of fulfilling the objectives of a conspiracy
16 are indeed the best evidence or best proof of the existence
17 of a conspiracy.

18 Most respectfully, to this learned Court, I
19 except to that on the ground that it is boot strap and
20 circular, if your Honor pleases.

21 Lastly, if your Honor pleases, your Honor indicated
22 to this jury that one overt act must be found by them beyond
23 a reasonable doubt and if that overt act be committed during
24 the pendency of the conspiracy, notwithstanding the fact
25 that it was committed on a date other than the date charge

1 rglm 94

2 in the information, that fulfills the requirements of
3 the operative laws of conspiracy.

4 THE COURT: On a date other than the date? I
5 said that they had to find that at least one of the overt
6 acts occurred not earlier than April 9th and no later
7 than whatever the date was.

8 MR. CANTOR: Then I would only except, if your
9 Honor pleases, to that portion of the charge. I believe
10 the proper instruction would be that they must find one
11 of the overt acts charged in the information to have been
12 committed and committed on the date alleged in the
13 information.

14 THE COURT: No, that's in correct.

15 MR. PRAVDA: Your Honor, I would join in the
16 exception as to the legislative history part that was made
17 by Mr. Cantor on behalf of Mr. Rodriguez.

18 THE COURT: All right.

19 MR. MAC BETH: Following the side bar that we
20 had on the 3500 material I presented one more item to the
21 defense counsel and I simply wanted to put that on the
22 record. It was Government Exhibit 3520 for the witness
23 Thomas Tolentino and it was his diary notes of April 9,
24 1975.

25 THE COURT: All right.

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The jurors are going out at 1:00 o'clock so
if you come back at 2:15 --

MR. PRAVDA: Your Honor, could you again
determine the restaurant they are going to.

THE COURT: The Attache.

MR. PRAVDA: Thank you.

(Luncheon recess.)

1 rglm 96

2 AFTERNOON SESSION

3 (At 3:35 p.m., a note was received from the
4 jury.)

5 (Note from jury marked Court's Exhibit 7.)

6 (In open court; jury not present.)

7 THE COURT: We have a note from the jurors which
8 was marked Court's Exhibit 7, which reads as follows:

9 "We need a dictionary, paper, envelopes."

10 All right, gentlemen, if there is an objection
11 to sending in a dictionary, I will hear it.

12 MR. PRAVDA: I will make one application on
13 behalf of Rodriguez; that in the delivery of the dictionary,
14 that your Honor admonish the jury that as regards certain
15 terms that you define in your charge, these terms have
16 specific meanings, within a legal framework, other than
17 what they may find from looking up such a word in any
18 standard dictionary.

19 MR. MAC BETH: The Government would add to that
20 that they are bound by your Honor's charge, not by what
21 they find in the dictionary as to any terms or words
22 defined in the charge.

23 THE COURT: We will bring them in and tell them --

24 MR. CANTOR: Before you do that, I do not join
25 in Mr. Pravda's application and I oppose Mr. Mac Beth's

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2 application and I submit the following:

3 Obviously a juror is empowered with a reservoir
4 of experience and obviously your Honor's charge is not
5 directed towards cutting off that reservoir of experience.
6 That juror with that fund of experience walks into that
7 jury room and applies it according to the law as you have
8 given them and applying it to the facts. I only think
9 that if you supply something like a dictionary, does it
10 not supplement a juror's experience? Does it not increase
11 a juror's experience by having recourse or accessibility
12 to extraneous matter and, thus, Judge, when you in your
13 charge have indicated to a juror, "Use your common sense,"
14 you are now saying "Use your common sense plus acceptability
15 to supplemental materials," if you give them the dictionary,
16 Judge. So I am concerned about that.

17 THE COURT: No, the Court disagrees. In a legal
18 proceeding the Court is in effect the dictionary to the
19 extent that the Court is bound to define any legal terms
20 that the jury does not understand in the charge or by
21 further instruction. Objection overruled.

22 Bring in the jury.

23 MR. CANTOR: Judge, will defense counsel have
24 an opportunity to look at the dictionary before it is
25 passed over to the jury?

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2 THE COURT: Read the record, please, Mr.
3 Reporter. Mr. Cantor wasn't listening.

4 (Record read.)

5 (Jury present.)

6 THE COURT: Ladies and gentlemen, I have your
7 latest note which has been marked Court's Exhibit 7 and
8 which reads as follows:

9 "We need a dictionary, paper and envelopes."

10 The clerk, I understand, has furnished the
11 additional paper and envelopes to you, but with respect
12 to the request for the dictionary, you will recall
13 that when I instructed you I told you that you had to
14 decide this case based solely on the evidence presented in
15 court and the Court's instructions as to the law, so that
16 with respect to the definition of any legal terms or any
17 other term for that matter, it is the Court's duty to
18 reread the definition as stated to you already in the
19 charge or to supply you with an additional instruction so
20 that a dictionary is not properly part of the jury's
21 deliberations.

22 The jury is to deliberate on the evidence, and
23 again the evidence consists, as I told you, of the witnesses'
24 testimony, the exhibits which were actually received in
25 evidence and any stipulations, so if you want to write a

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2 further note, explaining what you want to look up in the
3 dictionary, I will further instruct you as to the meaning
4 of that term.

5 All right, you may return to the jury room.

6 (At 4:00 p.m., the jury again retired to
7 continue their deliberations.)

8 (At 4:25 p.m., a note was received from the
9 jury.)

10 (Jury present.)

11 THE COURT: Ladies and gentlemen, I have your
12 latest note, which will be marked Court's Exhibit 8, which
13 reads as follows:

14 "Please reread that part of your charge to us
15 explaining 'engaging in the business of dealing in fire-
16 arms.' "

xxx

17 (Note from jury marked Court Exhibit 3.)

18 THE COURT: I charge you that the statutes in
19 question do not set forth specifically a definition of
20 the words "engaging in the business of dealing in firearms."
21 Therefore, you are to apply your common sense and general
22 experience in determining whether or not the defendants
23 engaged in the business of dealing in firearms.

24 I charge you further that there are certain well-
25 established characteristics of "engaging in business" which you

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2 must apply in reaching your verdict. Business is that
3 which occupies the time, attention and labor of men for
4 the purpose of a livelihood or profit. To engage in
5 business implies an element of continuity or habitual
6 practice. One who is engaged in the business of dealing
7 in firearms must have guns on hand or be ready and able
8 to procure them and sell them to such persons as might
9 accept them as customers.

10 I charge you further on this subject that
11 engaging in business does not mean the performance of a
12 single disconnected business act, nor does it mean one or
13 more isolated transactions. If you do not find that the
14 defendants were engaged in the business of dealing in fire-
15 arms, then whether or not it has been shown that they sold
16 one or more firearms, I charge you that you must acquit
17 the defendants. An isolated sale in one's home does not
18 place an individual in the business of dealing in firearms
19 in the absence of other characteristics indicative of
20 such business as I have just explained.

21 All right, you may return to the jury room.

22 (At 4:27 p.m., the jury again retired to
23 continue their deliberations.)

24 (Recess.)

25 (At 4:48 p.m., a note was received from the
jury.)

(In open court; jury not present.)

THE COURT: We have a note from the jurors, gentlemen. They want the conspiracy charge reread.

(Note from jury marked Court Exhibit 9.)

(Jury present.)

(At 4:58 p.m., a note was received from the jury.)

THE COURT: Ladies and gentlemen, I have your first note -- pardon me, your latest note, which will be marked Court's Exhibit 9, which reads as follows:

"Please reread your charge to us on conspiracy."

Then we have your next note, which will be marked Court's Exhibit 10.

(Note from jury marked Court Exhibit 10.)

THE COURT: This reads as follows:

"We request a rereading of direct examination by the prosecution of Agent Chino with respect to the events of April 9th."

After I reread the conspiracy charge, we will take a recess so that the reporter can find that in his notes.

What is a conspiracy? A conspiracy is a collective criminal agreement, a partnership in crime. A conspiracy presents a greater potential threat to Government and

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society than acts committed by a lone wrongdoer. That is why the Congress has made conspiracy to violate a federal statute a separate crime. Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish. Moreover, group association increases the likelihood that the criminal objective will be successfully realized and renders detection more difficult than in the instance of the lone wrongdoer.

It is for these and other reasons that the Congress has made conspiracy or concerted action to violate a federal law a separate and entirely distinct and different crime from the substantive law which may be the objective of the conspiracy. In order to prove the crime of conspiracy, the Government must establish to your satisfaction beyond a reasonable doubt each of the following essential elements of the crime of conspiracy:

First; the existence of the conspiracy as alleged in the indictment.

Second; that it was a purpose of the conspiracy as alleged in the indictment to violate Title 18, United States Code, Section 922(a)(1).

Third; that the defendants knowingly and

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2 willfully became, or a defendant who you are then considering,
3 knowingly and willfully became a participant in, that is,
4 a member of the conspiracy.

5 Fourth; that at least one of the co-conspirators
6 knowingly committed at least one of the overt acts set
7 forth in the indictment in furtherance of the conspiracy
8 and during the period of the conspiracy alleged in the
9 information.

10 Where I said "indictment," I intended to say
11 "information."

12 Now I will discuss the first element in greater
13 detail.

14 To establish a conspiracy, the Government is not
15 required to show that two or more persons sat around a
16 table and entered into a solemn compact orally or in
17 writing, stating that they have formed a conspiracy to
18 violate the law, setting forth details of the plan, the
19 means by which the unlawful project is to be carried out
20 or the part to be played by each co-conspirator. Indeed,
21 it would be extraordinary if there were such a formal
22 agreement or specific oral statement. Your common sense
23 will tell you that when men in fact undertake to enter
24 into a criminal conspiracy much is left to unexpressed
25 understanding. Conspirators do not usually reduce their

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agreements to writing or acknowledge them before a notary public, nor do they publicly broadcast their plans. From its very nature, a conspiracy is almost invariably secret in its origin and execution.

Therefore, it is sufficient if you find that two or more persons in any manner through any contrivance impliedly or tacitly come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy, nor is it required to find that all the co-conspirators alleged in the information joined in the conspiracy. In order to find that a conspiracy existed, you need only find that one of the defendants entered into an unlawful agreement with one or more other persons in order to find that a conspiracy existed.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged, co-conspirators which are done to carry out an apparent criminal purpose. The adage "Actions speak louder than words" is applicable here. Usually the only evidence available of a conspiracy is that of disconnected acts which, however, when taken together in connection with each other, show a conspiracy to secure a particular result as satisfactorily and conclusively as more direct proof.

1
2 Proof concerning the accomplishment of the objective of
3 a conspiracy may be the most persuasive evidence of the
4 existence of the conspiracy itself. Success of the venture,
5 if you believe it was successful, may be the best proof
6 of the existence of the agreement. In this connection,
7 it is not necessary for the Government to prove the
8 success of the conspiracy in order to establish a violation
9 of the conspiracy statute. As a conspiracy is basically
10 the agreement to violate the law, it may exist even though
11 the final objectives were never accomplished.

12 In determining whether the conspiracy charged
13 in this information actually existed, you may consider the
14 evidence of the acts and conduct of the alleged conspirators
15 as a whole and the reasonable inferences to be drawn from
16 such evidence. If upon such consideration of the evidence
17 you find beyond a reasonable doubt that the minds of at
18 least two of the alleged co-conspirators met in an under-
19 standing way and that they agreed, as I have explained a
20 conspiratorial agreement to you, to work together in
21 furtherance of the unlawful scheme alleged in the informa-
22 tion, then proof of the existence of the conspiracy, but
23 only of its existence, is complete.

24 While the information charges that the conspiracy
25 began on or about April 9, 1975 and continued to on or

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about February 11, 1976, it is not essential that the Government prove that the conspiracy started and ended on or about those specific dates. It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial time within the period set forth in the information and that at least one of the overt acts was committed in furtherance of the conspiracy during that period.

An overt act which you find did occur, need not have occurred on the specific date set forth in the indictment. You need only find that it occurred no earlier than April 9, 1975 and no later than February 11, 1976.

Now we move to the second element of the crime of conspiracy. The indictment charges that the conspiracy had as an objective the violation of Section 922(a)(1) of Title 18, United States Code. The Government must prove the second element of the crime of conspiracy. That is, it must prove that it was a purpose of the conspiracy to violate this law.

Now we come to the third element. The third element which you must find is that the defendant knowingly and willfully became a member of the conspiracy. A defendant's participation in the conspiracy, like its existence, can be inferred from such facts and circumstances

in evidence as would logically sustain that inference.

I want to caution you, however, that mere association of one defendant with an alleged conspirator or conspirators does not establish his participation in the conspiracy if you find that one did exist. So, too, mere knowledge by a defendant of the conspiracy or any illegal act on the part of an alleged co-conspirator is not sufficient evidence to establish his membership in the conspiracy. You must find actual knowing participation by this particular defendant that you are then considering in the agreement to violate the law.

An act is done knowingly if it is done voluntarily and purposefully and not because of mistake, accident, mere neglect or other innocent reason. An act is done willfully if it is done knowingly, deliberately and with an evil motive or purpose. In determining whether a defendant has acted willfully, it is not necessary for the Government to establish that the defendant knew that he was breaking any particular law or any particular rule. It must, however, prove that defendant had an evil motive or a bad purpose in mind. Knowledge and willfulness and intent of a defendant, as I have told you before, need not be proved by direct evidence. Like any other fact in issue, it may be established by circumstantial evidence.

Even if one conspirator joined the conspiracy after it was formed and was engaged in it to a degree more limited than that of other co-conspirators, he is equally culpable so long as he was a co-conspirator. In other words, it is not required that a person be a member of the conspiracy from its very start. He may join it at any point during its progress and be held responsible for all that has been said or done in furtherance of the conspiracy and that may be said or done thereafter during the existence of the conspiracy and in furtherance thereof and while he remains a member of the conspiracy.

Simply stated, and using the partnership analogy, by becoming a partner he assumes all the liabilities of the partnership, including those which occurred before he became a member.

It is not required that the Government show that a conspirator knew all the other members of the conspiracy. A conspiracy, once formed, is presumed to have continued until its objective was accomplished or there is some affirmative act of termination by its members. Once you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendant was a member of it, any acts and declarations of any person whom you find was also a member of the conspiracy made during its pendency

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and in furtherance of its objectives, are considered the acts and declarations of all other members even though the particular defendant was not present at the time or did not know such statements were made or such acts were done by others in furtherance of the conspiracy.

In other words, every co-conspirator is fully responsible for what every other co-conspirator does in furtherance of the conspiracy, whether he knows about it or not and whether he specifically approves of it or not.

Fourth. Now we come to the final element of the crime of conspiracy. The offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the co-conspirators. An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that while parties might conspire and agree to do an unlawful thing, they may change their minds or even abandon the project and do nothing to carry it into effect, in which event it would not be an offense.

The prosecution is not required to set forth in the indictment each and every act on which it relies to establish the conspiracy or the defendant's participation

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2 therein, nor is it required to prove each overt act which
3 may have occurred during and in furtherance of the
4 conspiracy, but it is required to prove that at least one
5 overt act did take place in the Southern District of New
6 York, which includes The Bronx. The overt act need not
7 be criminal in itself. The overt act, however, must be an
8 act which follows and tends toward the accomplishment of
9 the plan or scheme charged in the conspiracy count and
10 must be knowingly done in furtherance of some objective
11 of the conspiracy charged.

12 Now, if you find that the Government has failed
13 to establish beyond a reasonable doubt any one of the
14 four elements of the crime of conspiracy, as I have just
15 enumerated and discussed them for you, then you must find
16 the defendant not guilty of the charge of conspiracy. On
17 the other hand, if you should find that the Government has
18 sustained its burden of proving each and every one of the
19 four elements of the crime of conspiracy, as I have just
20 enumerated and discussed them and as to a particular
21 defendant beyond a reasonable doubt, then you may convict
22 that defendant on the conspiracy count.

23 THE FORELADY: Could you possibly read Section
24 922?

25 THE COURT: Yes.

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2 Section 922(a)(1) of Title 18, is the section
3 that the defendants are charged with conspiring to
4 violate and that reads, in pertinent part, as follows:

5 "It shall be unlawful for any person except a
6 licensed importer, licensed manufacturer or licensed
7 dealer, to engage in the business of importing, manufactur-
8 ing or dealing in firearms or ammunition."

9 THE FORELADY: Okay.

10 (At 5:18 p.m., the jury again retired to
11 continue their deliberations.)

12 (In open court; jury not present.)

13 THE COURT: The jurors sent out another note, which
14 reads as follows:

15 "Please read cross-examination of Chino
16 by lawyers, of April 9th, in addition to direct examination."

17 (Note from jury marked Court's Exhibit 11.)

18 THE COURT: The reporter has found the portions
19 of the transcript that you desire to have read back, and
20 that is the testimony of the agent on his direct examina-
21 tion and cross-examination with respect to April 9th.

22 (Record read.)

23 THE COURT: All right, you may return to the
24 jury room.

25 (Recess.)

xxx

(At 6:45 p.m., the jury returned to the courtroom.)

(Jury roll called - all present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: How do you find the defendant Louis Soto on Count 1?

THE FORELADY: Not guilty.

THE CLERK: Count 2?

THE FORELADY: Not guilty.

THE CLERK: Count 3?

THE FORELADY: Guilty.

THE CLERK: Count 4?

THE FORELADY: Guilty.

THE CLERK: How do you find the defendant Ricardo Fondeur on Count 1?

THE FORELADY: Not guilty.

THE CLERK: Count 2?

THE FORELADY: Not guilty.

THE CLERK: Count 3?

THE FORELADY: Not guilty.

THE CLERK: Count 4?

THE FORELADY: Not guilty.

THE CLERK: How do you find the defendant Jose Delvas on Count 1?

THE FORELADY: Not guilty.

THE CLERK: Count 2?

THE FORELADY: Not guilty.

THE CLERK: How do you find the defendant David Rodriguez on Count 1?

THE FORELADY: Not guilty.

THE CLERK: Count 2?

THE FORELADY: Not guilty.

THE CLERK: Count 3?

THE FORELADY: Guilty.

THE CLERK: Count 4?

THE FORELADY: Guilty.

THE CLERK: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you find the defendant Louis Soto not guilty on Counts 1 and 2, guilty on Counts 3 and 4; Ricardo Fondeur not guilty on Counts 1, 2, 3 and 4; the defendant Jose Delvas not guilty on Counts 1 and 2; the defendant David Rodriguez not guilty on Counts 1 and 2, guilty on Counts 3 and 4, and so say you all.

THE COURT: Anything further?

MR. SUFFERN: Would you poll the jury.